

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-1513

B
PSS

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 76-1513

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
against

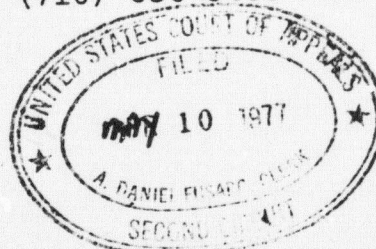
RICHARD KELSEY and
EDWARD A. OW CZARZAK, et. al.

Defendants-Appellants

ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF
NEW YORK

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS

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QUESTIONS PRESENTED

1. Were the Defendants' rights to a fair trial prejudiced by the substitution of alternate jurors?
2. Was the Government's application in support of the wire-tap orders sufficiently detailed?

PRELIMINARY STATEMENT

This is an Appeal from a judgment of conviction in the United States District Court for the Western District of New York (Elfvin, District Judge), entered October 12, 1976, convicting the Defendants of conspiracy to commit offenses against the United States by conducting, financing, managing, supervising, directing and owning an illegal gambling business and the substantive offense of conducting such gambling business, in violation of 18 U.S.C., Section 371 and 18 U.S.C., Section 1955.

STATEMENT OF FACTS

On January 7, 1976, an Indictment was filed in the Western District of New York charging five defendants with Operating an Illegal Gambling Business (18 U.S.C. §1955) and Conspiracy to Operate an Illegal Gambling Business (18 U.S.C. §371). An investigation of the alleged Illegal Gambling Business began in June of 1975 when the Federal Bureau of Investigation developed information, through the use of informants, concerning the operation of what came to be referred to as the "Joseph Lombardo Sports - Bookmaking Business."

During the course of the investigation the FBI continued to accumulate and use informant information. The FBI also conducted physical surveillance. Thereafter, on October 31, 1975, application was made to the Honorable John T. Elfvin, Judge of the United States District Court for the Western District

of New York for orders authorizing wire-taps for two telephones located at 291 Palmdale Drive, Amherst, New York, and for the installation of pen-register devices for the same telephones. The applications were granted and the telephone taps and pen-registers were installed. Thereafter; on December 1, 1975, an application was again made to Judge Elfvin, based in part upon information gathered as a result of the October 31st orders, for a continuation of the October 31st orders, and for wire-tap and pen-register orders for telephones located at Three Windham Court, Amherst, New York. Evidence gathered as a result of all orders was admitted at trial.

Trial began on August 17, 1976, and during voir dire one of the jurors, Mr. Mason, indicated that he had vacation plans for August 27. Previously, another juror, Mr. Gardner, had advised the Court of a business commitment on September 7, 1976. Despite

this information, the jurors were allowed to sit, and the selection of two alternate jurors began. These jurors were promised that they would be relieved of service if their plans could not be modified.

Alternate Juror Number Two, Mr. Fox, informed the Court and counsel that he was in training as an Internal Revenue Agent and that as part of his duties he dealt directly with the interception and recording of taxpayers' conversations. At this point the defense challenged Mr. Fox for cause. This challenge was denied and because there were no more peremptory challenges available to the defense, counsel were forced to accept Mr. Fox.

On August 27, 1976, mid-way through the trial, the juror who had advised the Court during voir dire of vacation plans, informed the Court that his plans could not be changed, and he was then relieved from the jury. Thereafter, on September 3, 1976, a

second trial juror, Mr. Gardner, asked the Court to be relieved from further service by reason of a business engagement, which engagement, as stated above, was known by the Court to exist at the outset of the trial. The Court, at this time, gave Mr. Gardner the option of returning or not returning on September 7, 1976. Mr. Gardner did not return on September 7, 1976, and accordingly, Mr. Fox was seated.

POINT I

THE APPLICATIONS FOR WIRE-TAP
AND PEN-REGISTER WERE INADE-
QUATE AS A MATTER OF LAW.

For a court to issue an order author-
izing the interception of a wire or oral communication,
the application must be in writing upon oath or
affirmation. The application must include the infor-
mation specified in 18 U.S.C. §2518(1), subsection (c)
of which requires that the application contain,
among other things:

"a full and complete statement
as to whether or not other in-
vestigative procedures have been
tried and failed or why they
reasonably appear to be unlikely
to succeed if tried or to be too
dangerous."

In order for the wire-tap to be law-
fully authorized, there must be compliance with all of
the requirements of 18 U.S.C. §2518, and where any of

the statutory requirements are unsatisfied, the intercepted communications must be suppressed. United States v. Giordano, 416 U.S. 505 (1974). In Giordano the Supreme Court said at page 515:

"Congress legislated in considerable detail in providing for applications and orders authorizing wire-tapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the Court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The only allegation contained in the October 31, 1976, application, other than "boiler plate" language, is on page 22 of the application, where it is stated:

"Sources One and Two have both stated that they will not testify as to the information they provided."

In United States v. Steinberg, 525 F. 2d 1126 (2nd Cir. 1975), where this Court was concerned with the minimum standards for compliance with the statute, the application stated, as justification for a wire-tap warrant for an alleged narcotics dealer, that covert access could not be developed because narcotics dealers are usually wary of surveillance, very rarely keep records, deal with only a few trusted individuals and isolate themselves from other individuals in the distribution organization. The court, in discussing the sufficiency of these allegations, stated at page 1130:

"While the Government will be well advised in the future to include a more detailed factual statement indicating the inadequacy of other investigative techniques, the affidavit herein

did contain enough data to permit the authorizing judge reasonably to conclude that other means would be unlikely to succeed in revealing the scope of Steinberg's operation and his sources of supplies."

Several other courts of appeals have ruled upon what constitutes compliance with 18 U.S.C. §2518(c). These include the inability to identify the scope of the operation or the identities of the persons involved, United States v. Mateja, 541 F. 2d 741 (8th Cir. 1977) and United States v. Woods, 544 F. 2d 242 (6th Cir. 1976); where the informant could not give extensive information, United States v. Schwartz, 535 F. 2d 160 (2nd Cir. 1976); and where the target of the investigation was suspicious of strangers, physical surveillance would be difficult and potentially dangerous, and an increased frequency of contacts with the undercover agent would have disclosed his undercover role. In re Dunn, 507 F. 2d 195 (1st Cir. 1974). No court, it is submitted, has approved the mere assertion of an allegation as that contained in this case.

In the instant case, the reason for the absence of the necessary factual allegations to support the "boiler plate" language in the application for the wire-tap order is obvious from the application itself. That is, the Federal Bureau of Investigation had successfully been conducting an investigation of the "Joseph Lombardo Sports - Bookmaking Business" for approximately four months prior to the date of the application for the wire-tap order. During the course of the investigation the FBI was able to determine precisely four of five principals who were indicted, and the "nick-name" of the fifth. The thirty-two page affidavit accompanying the application details, with considerable specificity, physical surveillances, record checks and conversations with informants and secondary sources.

Aside from the "boiler plate" assertions contained in the application, the only factual reason presented to the judge to explain why normal investigative procedures were not possible, is the alleged reluctance of informants to testify. The judge was

never informed as to the basis of the informant's reluctance, nor whether or not any actions could be taken to remove the informant's reluctance. No facts were presented as to whether the reluctance could be removed by a grant of immunity or by prosecutorial or judicial leniency toward the informer.

It must also be noted that the "boiler plate" assertions concerning the inability to continue the investigation made in the applications are not accurate. Prior to making the application normal investigative techniques were utilized. As previously noted, these normal investigative techniques disclosed four of the five principals of the "Joseph Lombardo Sports - Bookmaking Business," the location of the business, the telephone numbers of the business and the possible identity of the fifth, and last member of the organization. It is obvious that this last member of the "business" could have been determined by normal

investigative techniques. Once Donald DiCarlo was identified, he could have led the agents to Three Windham Court and this would have further led to the discovery of Mr. Owczarzak.

Notice should also be taken that the FBI failed to disclose in their affidavit prior surveillance contact with Mr. Owczarzak (Appendix 84 - 87), thereby demonstrating that, in fact, the telephone wire-taps were unnecessary to determine the identity of all of the defendants. It is submitted that in making the applications for the wire-tap orders these pertinent facts were intentionally omitted in an attempt to mislead the judge into the conclusion that the extraordinary investigative technique of telephone wire-taps was necessary to continue the investigation. It is further submitted that, even taking into consideration this omission, the applications failed to properly demonstrate the need for telephone wire-taps pursuant to 18 U.S.C. §2518(c) and, accordingly, the use of the fruits of the wire-taps and pen-register evidence should have been suppressed.

POINT II

THE COURT, BY NOT EXCUSING TWO JURORS WHO WOULD BE UNABLE TO HEAR THE FULL TRIAL, AND, BY NOT EXCUSING ALTERNATE JUROR NUMBER TWO, EFFECTIVELY DENIED THE DEFENDANT A FAIR TRIAL BY A JURY OF TWELVE SELECTED BY HIM.

Rule 24 of the Federal Rules of Criminal Procedure allows defendants ten peremptory challenges where the possible sentence of the Court can exceed one year; the Court can allow defendants additional challenges if the situation so warrants. While the right to peremptorily challenge is not a right guaranteed by the Constitution, it is an important statutory right which helps to assure a defendant that his case will be heard by a fair, impartial jury. The Fifth Circuit Court of Appeals in United States v. Sams, 470 F. 2d 751 (5th Cir. 1972), stated that any system of empanelling jurors which denies the defendant

a full, unrestricted use of the peremptory challenges to which he is entitled should be condemned. In the case cited, the Court reversed the conviction of the defendant because his counsel inadvertently waived challenges to which the defendant was entitled.

It is important to note that in the present case the Court was aware from the outset of jury selection that two of the jurors who had been sworn would not be able to serve throughout the trial (Appendix 72 - 74). Accordingly, the defendants were deprived of the opportunity to properly use the peremptory challenges to which they were entitled. The reason why this is so becomes apparent on examination of the method by which defendants determine which jurors they will excuse peremptorily.

In the case at bar, peremptory challenges were exercised in "rounds" after twelve veniremen were seated and questioned by the Court.

Accordingly, the defendants, at all times, should have the opportunity to consider twelve potential jurors, and thereafter, make the determination as to which of the twelve potential jurors they will excuse peremptorily. However, the defendants were never afforded the opportunity to view the potential jury of twelve people prior to having to make the decision of which jurors were to be excused. It was apparent to the Court that Mr. Mason and Mr. Gardner would be unable to serve throughout the entire trial. Consequently, the defendants were forced to make the decision on whom to excuse based upon a panel of only ten jurors. The practical effect was that the actual selection of the jury was completed only after the two alternate jurors were seated.

As this Court is well aware, the decision whether or not to excuse a juror is, from the defense's point of view, largely a matter of determining what or who is the lesser evil. The defendants

have a limited number of peremptory challenges which are used to eliminate those potential jurors whom the defendants feel would be most prejudicial to their cause; in short, the defendant should be afforded the opportunity of eliminating the "worst" ten jurors. In the case at bar, the defendants were denied this right because two of the jurors they had to consider should not have been called to sit on this case in the first instance.

It is not the defendants' contention that the Court in the sole act of excusing the two jurors, abused its discretion to such an extent that reversal is required. The defendants' contention is that the Court committed error in initially allowing the two jurors to be sworn, and that this error was consummated, or compounded, when both jurors were excused. By excusing both jurors, the Court paved the way for Alternate Number Two, Mr. Fox, to participate in the deliberations and the verdict.

At the time Mr. Fox was seated as potential Alternate Juror Number Two, the defendants had used all the peremptory challenges they were allowed. Despite the fact that Mr. Fox was employed as an Internal Revenue Service Agent who dealt with intercepting and recording of taxpayers' conversations, the Court refused to excuse him for cause.

Consideration should also be given to the manner in which Mr. Gardner was allowed to excuse himself from jury service. While the Court informed counsel and the defendants of the problems Mr. Gardner was facing, the Court ultimately left it completely up to the discretion of the juror as to whether or not he would return. In practical effect Mr. Gardner was allowed to excuse himself.

United States v. Bailey, 468 F. 2d 652 (5th Cir. 1972) sets forth the proposition that absent a clear abuse of discretion the trial judge's action in dismissing a juror will not be disturbed on appeal.

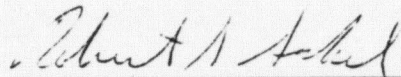
Although, taken alone, the excusing of the jurors in the instant case may not amount to an abuse of discretion, the series of rulings outlined above, taken in combination, requires reversal.

In combining the trial Court's failure to excuse the jurors prior to their being sworn and the failure to excuse Alternate Juror Number Two for cause, reversible error was committed. The defendants were denied their rights to properly exercise the peremptory challenges they were given and they were then prejudiced by the seating of a juror who should have been excused for cause. Accordingly, where there is error committed in the replacing of jurors and the defendant thereby demonstrates that he has been prejudiced as a result, the conviction should be reversed. United States v. Ellenbogen, 365 F. 2d 92 (2nd Cir. 1966), Cert. Den. 386 U.S. 923 (1967).

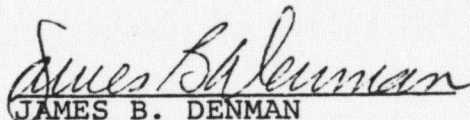
CONCLUSIONS

The Judgment of Conviction should be reversed, the evidence suppressed and the Indictment dismissed.

Respectfully submitted,



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Owczarzak



JAMES B. DENMAN
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In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

JOSEPH A. LOMBARDO
DONALD A. DiCARLO a/k/a "TONY"
RICHARD KELSEY
JACK M. SILVERSTEIN
EDWARD A. OWCZARZAK a/k/a "O-Z"

COUNT I

NOVEMBER 1975 SESSION
IMPANELED NOV. 18, 1975

CR. 76 - 3

Vio. 18 U.S.C. 371
18 U.S.C. 1955
18 U.S.C. 2232

FILED: JAN 7 1976

The Grand Jury charges:

That continuously throughout the period between September 1, 1975 and December 20, 1975, in the Western District of New York and elsewhere, JOSEPH A. LOMBARDO, DONALD A. DiCARLO a/k/a "TONY", RICHARD KELSEY, JACK M. SILVERSTEIN and EDWARD A. OWCZARZAK a/k/a "O-Z", the defendants herein, and others, unlawfully did knowingly conspire, combine and agree together and with each other to conduct, finance, manage, supervise, direct and own an illegal gambling business in the form of a sports book-making operation which violated the provisions of Article 225 of the Penal Laws of the State of New York, all of which was in violation of Section 1955 of Title 18 of the United States Code;

OVERT ACTS

And, during the period aforesaid, the said defendants and co-conspirators committed, among others, the following overt acts in furtherance of the said conspiracy and in order to effectuate the object and purpose thereof, to wit:

(1) On November 2, 1975, the defendant EDWARD A. OWCZARZAK a/k/a "O-Z", had a telephone conversation with the defendant RICHARD KELSEY over telephone number 716-633-2225, located at Apartment 6, 291 Palmdale Drive, Amherst, New York, during which the defendant

RICHARD KELSEY telephonically relayed sports line information to A-2
the defendant EDWARD A. OWCZARZAK, a/k/a "O-Z";

(2) On November 7, 1975, the defendant JOSEPH A. LOMBARDO had a telephone conversation with the defendant RICHARD KELSEY over telephone number 716-633-2225, located at Apartment 6, 291 Palmdale Drive, Amherst, New York, during which the defendant JOSEPH A. LOMBARDO had a conversation with the defendant RICHARD KELSEY about matters relating to the operation of the aforesaid illegal gambling business;

(3) On November 8, 1975, the defendant JOSEPH A. LOMBARDO had a meeting with the defendant RICHARD KELSEY and with the defendant EDWARD A. OWCZARZAK, a/k/a "O-Z" in the parking lot in front of Ferrante's Restaurant, located at the corner of Maple and North Forest Roads, Amherst, New York;

(4) On November 15, 1975, the defendant JACK M. SILVERSTEIN accepted an illegal bet on a football game over telephone number 716-633-2254, located at Apartment 6, 291 Palmdale Drive, Amherst, New York;

(5) On December 3, 1975, the defendant DONALD A. DiCARLO, a/k/a "TONY" had a telephone conversation with the defendant RICHARD KELSEY over telephone number 716-633-2254, located at Apartment 6, 291 Palmdale Drive, Amherst, New York, during which the defendant DONALD A. DiCARLO, a/k/a "TONY" and the defendant RICHARD KELSEY discussed matters relating to the operation of the aforesaid illegal gambling business;

(6) On December 5, 1975, the defendant RICHARD KELSEY accepted illegal bets on sporting events over telephone number 716-633-2225, located at Apartment 6, 291 Palmdale Drive, Amherst, New York;

(7) On December 8, 1975, the defendant JOSEPH A. LOMBARDO had a telephone conversation with the defendant RICHARD KELSEY over telephone number 716-633-2225, located at Apartment 6, 291 Palmdale Drive, Amherst, New York, during which the defendant JOSEPH A. LOMBARDO and the defendant RICHARD KELSEY discussed matters relating to the operation of the aforesaid illegal gambling business;

All of which was in violation of Section 371 of Title 18 of the United States Code.

COUNT II

AND THE GRAND JURY FURTHER CHARGES:

That continuously from September 1, 1975 through December 20, 1975, in the Western District of New York and elsewhere, JOSEPH A. LOMBARDO, DONALD A. DiCARLO, a/k/a "TONY", RICHARD KELSEY, JACK M. SILVERSTEIN and EDWARD A. OWCZARZAK, a/k/a "O-Z", the defendants herein, unlawfully did conduct, finance, manage, supervise, direct and own an illegal gambling business in the form of an unlawful bookmaking operation involving sporting events which violated Article 225 of the Penal Law of the State of New York, and all of which was in violation of Section 1955 of Title 18 of the United States Code.

COUNT III

AND THE GRAND JURY FURTHER CHARGES:

That on or about December 20, 1975, in the Western District of New York, JOSEPH A. LOMBARDO unlawfully did destroy certain property, namely flash-paper, in order to prevent its seizure, before the said property could be seized by Special Agents PETER J. SOFIA and JOHN E. GILL, JR., of the Federal Bureau of Investigation, who were then and there duly authorized by law to search for and seize the said property;

All of which was in violation of Section 2232 of Title 18 of the United States Code.

RICHARD J. ARCARA
United States Attorney
Western District of New York

A TRUE BILL:

Foreman

1 PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 5:05 P.M.

2
3 (Defendants present, counsel present, jury
4 present.)

5
6 CHARGE OF THE COURT

7 THE COURT:

8 Now, I will try to make this as brief and
9 as succinct as I can. Of necessity, it is my
10 duty to tell you what all of the aspects of
11 the law are that bear upon your deliberations.
12 Before I do this I will mention one point that
13 you should bear in mind while I tell you what
14 the law is, I said it before and the attorneys
15 have said it, that is, that it is your duty
16 and yours alone to determine the facts in the
17 case, and that includes the guilt or the
18 innocence of each of the defendants. Also I
19 may refer briefly to my recollection of the
20 facts at one point or another, I don't know if
21 I shall, but if I do it is merely to assist
22 you in understanding the rules of law which I
23 am going to tell you about. You are not to
24 consider any such reference I may make here
25 or that I made during the trial as in any way
indicative of any verdict that I think you

1 should render, and also the fact that I have
2 denied motions which have been made from time
3 to time by defense counsel or by the attorney
4 for the Government or ruled upon their objec-
5 tions to different questions in certain ways,
6 is not to be taken as any expression by me
7 upon the facts of the case and, of course, even
8 if you should so consider it, you would ignore
9 any such opinion that I might have, and I
10 stress to you that I have none. Rely wholly
11 on your own recollection of what the evidence
12 in the case shows, and do not be influenced by
13 any remark that I have made or by what any
14 attorney may have made in opening or during the
15 course of the trial or during the closing
16 arguments.

17 We have three counts in the indictment,
18 and I will go through them one at a time.
19 Count 1 of the indictment says, "That continu-
20 ciously throughout the period between September 1,
21 1975 and December 20, 1975, in the Western
22 District of New York -- and I tell you that
23 the Western District of New York comprises
24 those seventeen counties which lie in the
25 western end of this state, and those seventeen

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

1 include Erie County -- in the Western District
2 of New York, and elsewhere, Joseph A. Lombardo,
3 Donald A. DiCarlo, Richard Kelsey, Jack M.
4 Silverstein and Edward A. Gwczarzak, the
5 defendants herein, and others, unlawfully did
6 knowingly conspire, combine and agree together
7 and with each other to conduct, finance, manage,
8 supervise, direct and own an illegal gambling
9 business in the form of a sports bookmaking
10 operation which violated the provisions of
11 Article 225 of the Penal Laws of the State of
12 New York, all of which is in violation of
13 Section 1955 of Title 18 of the United States
14 Code."

15 You will see, as you see the indictment
16 which will come to you in the jury room as
17 Court Exhibit A, a certain listing of what is
18 known as overt acts, and under that it says,
19 "And during the period aforesaid said defendants
20 and co-conspirators committed, among others,
21 the following overt acts in furtherance of
22 said conspiracy and in order to effectuate
23 the object and purpose thereof, to wit -- and
24 there are seven numbered paragraphs, the first
25 one, Number 1, "On November 2, 1975, the

1 defendant, Edward A. Owczarzak had a telephone
2 conversation with the defendant Richard Kelsey
3 over telephone number 716-633-2225, located
4 at Apartment 6, 291 Palmdale Drive, Amherst,
5 New York, during which the defendant Richard
6 Kelsey telephonically relayed sports line
7 information to the defendant Edward A. Owczarzak.
8 Secondly, on November 7, 1975, the defendant
9 Joseph A. Lombardo had a telephone conversation
10 with the defendant Richard Kelsey over tele-
11 phone number 716-633-2225, located at Apartment
12 6, 291 Palmdale Drive, Amherst, New York,
13 during which the defendant Joseph A. Lombardo
14 had a conversation with the defendant Richard
15 Kelsey about matters relating to the operation
16 of the aforesaid illegal gambling business.
17 Three, on November 8, 1975, the defendant
18 Joseph A. Lombardo had a meeting with the
19 defendant Richard Kelsey and with the defendant
20 Edward A. Owczarzak in the parking lot in
21 front of Ferrante's Restaurant, located at
22 the corner of Maple and North Forest Road,
23 Amherst, New York. Four, on November 15, 1975,
24 the defendant Jack M. Silverstein accepted
25 an illegal bet on a football game over telephone

2013

1 number 716-633-2254, located in Apartment 6,
2 291 Palmdale Drive, Amherst, New York. Number
3 five, on December 3, 1975, the defendant
4 Donald A. DiCarlo had a telephone conversation
5 with the defendant Richard Kelsey over tele-
6 phone number 716-633-2254, located in Apartment
7 6, 291 Palmdale Drive, Amherst, New York, during
8 which the defendant Donald A. DiCarlo and the
9 defendant Richard Kelsey discussed matters
10 relating to the operation of the aforesaid
11 illegal gambling business. Six, on December
12 5, 1975, the defendant Richard Kelsey accepted
13 illegal bets on sporting events over telephone
14 number 716-633-2225, located at Apartment 6,
15 291 Palmdale Drive, Amherst, New York. Number
16 seven, on December 8, 1975, the defendant
17 Joseph A. Lombardo had a telephone conversation
18 with the defendant Richard Kelsey over tele-
19 phone number 716-633-2225, located in Apartment
20 6, 291 Palmdale Drive, Amherst, New York,
21 during which the defendant Joseph A. Lombardo
22 and the defendant Richard Kelsey discussed
23 matters relating to the operation of the
24 aforesaid illegal gambling business." And
25 then the conclusory paragraph, "All of which

2014

1 was in violation of Section 371, Title 18,
2 United States Code." That section provides
3 in pertinent part as follows: "If two or
4 more persons conspire to commit any offense
5 against the United States, and one or more
6 of such persons do any act to effect the
7 object of the conspiracy, each shall be pun-
8 ished as the law provides."

9 Now, Count 1 alleges that from September 1,
10 1975 through December 20, 1975, there was a
11 conspiracy to violate Section 1955 of the
12 Federal Criminal Code, and that section pro-
13 vides in pertinent part: "Whoever conducts,
14 finances, manages, supervises, directs or owns
15 all or part of an illegal gambling business
16 shall be punished as the law provides." That
17 section goes on to define illegal gambling
18 business as being one which is, firstly, in
19 violation of the law of the state in which it
20 is conducted; secondly, involves five or more
21 persons who conduct, finance, manage, super-
22 vise, direct or own all or any part of such
23 business, and third, has been or remains in
24 substantially continuous operation for a
25 period in excess of thirty days or has a gross

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1 revenue of \$2000 in any single day.

2 The type of gambling business involved in
3 this indictment is that of a bookmaking opera-
4 tion involving sporting events. Because the
5 federal law defines in part an illegal gambling
6 business as one which is in violation of the
7 law of the state in which it is conducted,
8 which of course is New York State, we necessarily
9 turn to the law of the State of New York.
10 Article 225 of the New York State Penal Law
11 again in pertinent part provides, firstly,
12 certain definitions first of gambling, and
13 Section 225.00.2 says, "A person engaged in
14 gambling when he stakes or risks something
15 of value upon the outcome of a contest of
16 chance or a future contingent event not under
17 his control or influence, upon an agreement
18 or understanding that he will receive some-
19 thing of value in the event of a certain
20 outcome." Subsection 9 of that same section
21 defines bookmaking as meaning advancing
22 gambling activity by unlawfully accepting
23 bets from members of the public as a business,
24 rather than in a casual or personal fashion,
25 upon the outcome of future contingent events.

1 and the advancing of gambling activity is
2 defined in Subsection 4 in this way, it says
3 that a person advances gambling activity when
4 acting other than as a player he engages in
5 conduct which materially aids in any form of
6 gambling activity. Such conduct includes but
7 is not limited to conduct directed toward the
8 creation or establishment of a particular
9 scheme, device or activity involved, toward
10 the acquisition or maintenance of premises,
11 paraphernalia, equipment or apparatus there-
12 fore, toward the solicitation or inducement
13 of persons to participate therein, toward the
14 actual conduct of the playing phases thereof,
15 toward the arrangement of any of its financial
16 or recording phases or toward any other phase
17 of its operation. One advances gambling
18 activity when having substantial proprietary
19 or other authoritative control over premises
20 being used with his knowledge for purposes of
21 gambling activity he permits such to occur or
22 continue or makes no effort to prevent its
23 occurrence or continuation. The New York
24 laws are not directed against the bettor, but
25 are aimed at those persons involved in the

1 business of gambling, and thus a player is
2 excluded from criminal responsibility. Under
3 New York law a player means a person who en-
4 gages in any form of gambling solely as a
5 contestant or better without receiving or
6 becoming entitled to receive any profit there-
7 from, other than personal gambling winnings,
8 and without otherwise rendering any material
9 assistance to the establishment, conduct or
10 operation of the particular gambling activity.
11 A person who engages in bookmaking, and that
12 is in quotes, which refers to the defined term,
13 is not a player and, finally, the state law
14 provides that it is illegal for one to promote
15 gambling when he knowingly advances or profits
16 from unlawful gambling activity, and lastly,
17 all gambling activity is unlawful unless
18 specifically authorized by the state law.

19 Now, keep in mind that these defendants
20 are not being charged and have not been charged
21 here with any violation of New York State law.
22 There have been allusions to the fact that
23 this case ought not be tried here in Federal
24 court, and that the Government, the prosecutors
25 are trying to make a federal case out of it.

1 Well, what we are concerned with is only a
2 federal case. The defendants are charged with
3 a violation of federal law. I have instructed
4 you on the New York State law as it pertains
5 to bookmaking only because the federal law
6 defines illegal gambling business as one which
7 violates the laws of the State of New York in
8 this instance.

9 The second requirement that must be proved
10 to establish an illegal gambling business is
11 that it involves five or more persons who
12 conduct, finance, manage, supervise, direct
13 or own all or part of it. Those six verbs
14 that I have used, namely, conduct, finance,
15 manage, supervise, direct or own are words
16 that are used in their ordinary sense and
17 meaning. The word "conduct" as used does not
18 refer to mere betting customers or players
19 who merely patronize a gambling business, but
20 to conduct means to carry on, and refers to
21 both high level bosses and street level
22 employees, employees such as we might have
23 testimony about here who man telephones. It
24 includes all those who participate in the
25 operation of a gambling business, regardless

1 how minor their role, and whether or not they
2 would be labelled collectors, agents, runners,
3 clerks, office workers, employees, writers
4 or independent contractors who provide necessary
5 services.

6 Now, a person who accepts layoff bets may
7 be considered a necessary participant in the
8 operation of a gambling business, and he can
9 be convicted if any of the following factors
10 is present: Evidence that the person provided
11 a regular market for a high volume of such
12 bets or held himself out to be available for
13 such bets whenever bookmakers needed to make
14 them; evidence that the person performed any
15 other substantial service, as for example,
16 supplying of line information or evidence
17 that the person was conducting his own
18 illegal gambling operation and was regularly
19 exchanging layoff bets with other bookmakers.
20 Before a person who accepts layoff bets can
21 be found to have conducted an illegal gambling
22 business, it must be shown if he was an
23 intrical part of the bookmaking business.
24 Evidence that the person accepted occasional
25 layoff bets without more is insufficient to

1 find that he conducted an illegal gambling
2 business. One of the listed factors or other
3 evidence that the person was an intrical part
4 of the bookmaking operation is necessary.

5 To finance means to make funds available.
6 To manage means to run it or to have an
7 important voice in the direction of the busi-
8 ness. To supervise means to oversee or to
9 give direction to the operation. To direct
10 means to control the activities. To own means
11 to have title in some demonstrable way to all
12 or part of the business, such as sharing in
13 the business' profits or losses.

14 Now, at least five individuals must be
15 involved in the end result or goal of the
16 conspiracy, although fewer than five but at
17 least two can have conspired to violate this
18 federal law. The five or more individuals
19 can have various roles and overlapping roles,
20 for example, the ownership or the direction
21 or the supervision or the management or the
22 financing or the conduct can be by one person
23 or by more than one person. Also one person
24 can have more than one role, such as one can
25 own, and/or direct and/or supervise, and/or

1 manage, and/or conduct the activity. If you
2 find that one person owned and directed and
3 supervised and managed and financed the
4 activity, and that at least four other persons
5 conducted the activity, as the Government
6 contends, that is sufficient violation, from
7 the point of view of numbers, of the federal
8 law, and if such violation be the aim of a
9 conspiracy, then Section 371 has been violated.

10 Your determination as to who were to be
11 the participants need not be limited to the
12 five men who have been indicted, the indict-
13 ment, which is no evidence, says "and others,"
14 and you can find that there were other persons
15 whose names you may or may not know, but who
16 are otherwise fully and specifically identified
17 to you, were participants. If you do, that
18 would be sufficient to be a violation of
19 Section 1955, and if such violation be the
20 end result or goal of a conspiracy of two or
21 more persons, then that would be a violation
22 of Section 371.

23 The third element of the federal statute
24 which prohibits illegal gambling businesses,
25 namely, Section 1955, is that the gambling

1 activity was in substantially continuous
2 operation for a period in excess of thirty
3 days or had a gross revenue of \$2000 in any
4 one day. The Government is not required to
5 prove both of these, it is sufficient if the
6 Government proves one or the other. If you
7 find that bets placed in any single day between
8 September 1, 1975 and December 20, 1975 totalled
9 at least \$2000, that would be sufficient on
10 which to base a finding that the gambling
11 business had a gross revenue in that amount
12 in any single day. If, on the other hand, you
13 found that there was an illegal gambling busi-
14 ness in substantially continuous operation in
15 excess of thirty days, it does not matter
16 whether the business made a profit or whether
17 it lost money or whether it received \$2000 in
18 bets in any single day that it was in operation.

19 Now, a conspiracy is a combination of two
20 or more persons by concerted action to accom-
21 plish some unlawful purpose or to accomplish
22 a lawful purpose by unlawful means. Thus a
23 conspiracy is a kind of partnership in criminal
24 purposes in which each member becomes the
25 agent of every other member, and the gist of

1 the offense is the combination or agreement
2 to violate or disregard the law. Mere similarity
3 of conduct among various persons and the fact
4 they may have associated with each other and
5 may have assembled together and discussed
6 common aims and interests, does not necessarily
7 establish proof of the existence of a conspiracy.
8 However, the evidence need not show that the
9 members enter into any express or formal agree-
10 ment or that they directly by words spoken or
11 in writing stated between or among themselves
12 what their object or purpose was to be or the
13 details thereof or the means by which the
14 object or purpose was to be achieved. What
15 the evidence must show in order to establish
16 proof that a conspiracy existed is that the
17 members in some way or manner or through some
18 contrivance positively or tacitly came to a
19 mutual understanding to try to accomplish a
20 common and unlawful plan. It is not necessary
21 for the prosecution to prove that all of the
22 means or methods set forth in the indictment
23 were agreed upon to carry out the conspiracy
24 or that all such means or methods were actually
25 used or put into operation, but it is necessary

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1 that the evidence establish to your satisfac-
2 tion one or more of the means and methods
3 described in the indictment was agreed upon
4 to be used in an effort to effect or accomplish
5 some object or purpose of the conspiracy, as
6 charged in the indictment.

7 Now, one may become a member of a conspiracy
8 without full knowledge of all of the details
9 of the conspiracy. On the other hand, a person
10 who had no knowledge of a conspiracy, but
11 merely happens to act in a way which furthers
12 an object or purpose of the conspiracy, does
13 not thereby become a member of the conspiracy,
14 he does not become a conspirator. Before you
15 may find that a defendant or any other person
16 has become a member of a conspiracy, the
17 evidence must show that the conspiracy was
18 formed and that the defendant or other person,
19 who is claimed to have been a member, knowingly
20 and willfully participated in the unlawful
21 plan with the intent to advance or further
22 some object or purpose of the conspiracy.
23 To participate knowingly and willfully means
24 to participate voluntarily and understandingly,
25 and with a specific intent to do some act which

1 the law forbids or with a specific intent to
2 fail to do some act which the law requires to
3 be done, that is to say, to participate with
4 bad purpose, either to disobey or disregard
5 the law. So if a defendant or other person,
6 with understanding of the unlawful character
7 of a plan, intentionally encourages, advises
8 or assists for the purpose of furthering the
9 undertaking or scheme, he thereby becomes a
10 knowing and willful participant, a conspirator.
11 One who knowingly and willfully joins an exist-
12 ing conspiracy is charged with the same respon-
13 sibility as if he had been one of the instigators
14 of the conspiracy. In determining whether or
15 not a defendant or any other person was a member
16 of a conspiracy, you are not to consider what
17 others may have said or done, that is to say,
18 the membership of a defendant or other person
19 in a conspiracy must be established by evidence
20 as to his own conduct, by what he, himself,
21 said or did. The indictment charges a con-
22 spiracy among the named defendants and others
23 who are unnamed in the indictment. A person
24 cannot conspire with himself, and therefore
25 you cannot find any defendant guilty of the

1 conspiracy unless you find beyond a reasonable
2 doubt that he participated in the conspiracy
3 with at least one other person, whether such
4 other person be one of the named defendants
5 or one of the unnamed others. If and when it
6 appears from the evidence that a conspiracy
7 existed, and that the defendants or any one
8 of them was one of the members, then the acts
9 thereafter knowingly done and the statements
10 thereafter knowingly made by any person like-
11 wise found by you to be a member, and while he
12 is a member, maybe considered by you as
13 evidence in the case as to the member defendants
14 or defendant, even though the acts and state-
15 ments may have occurred in the absence and
16 without the knowledge of them or him, provided
17 the acts and statements were knowingly done
18 and made during the continuance of the con-
19 spiracy, and in furtherance of an object or
20 purpose of the conspiracy. Otherwise, any
21 act done or any admission or incriminatory
22 statement made outside of court by one person
23 may not be considered as evidence against any
24 person who was not present and heard the
25 statement made. Therefore the acts or statements

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1 of any conspirator, which were not in further-
2 ance of the conspiracy or which were made
3 before its existence or after its termination,
4 may be considered as evidence only against
5 the person doing them or making them.

6 Now, in your consideration of the evidence
7 in the case as to the charged offense of con-
8 spiracy, you should first determine whether
9 or not the conspiracy existed as alleged in
10 the indictment. If you conclude that the
11 conspiracy did exist, then you next determine
12 as to each defendant whether or not he will-
13 fully became a member of the conspiracy. If
14 it appears beyond a reasonable doubt -- I
15 will use that term from time to time and later
16 on I will define it for you -- it appears
17 beyond a reasonable doubt from the evidence
18 in the case that the conspiracy alleged in
19 the indictment was willfully formed and that
20 a particular defendant willfully became a
21 member of the conspiracy, either at its
22 inception or afterwards, and that thereafter
23 one or more of the conspirators knowingly
24 committed one or more of the overt acts, which
25 I read to you, namely, one or more of the

1 seven acts which were listed at the end of
2 Count 1 in the indictment, in furtherance of
3 some object or purpose of the conspiracy,
4 then there may be a conviction even though
5 the conspirators may not have succeeded in
6 accomplishing their common object or purpose
7 and, in fact, may have failed in so doing.
8 The extent of any defendant's participation
9 moreover is not determinative of his guilt
10 or innocence. A defendant may be convicted
11 as a conspirator even though he may have played
12 only a minor part in the conspiracy.

13 An overt act, which I have alluded to,
14 is any act knowingly committed by one of the
15 conspirators in an effort to effect or accom-
16 plish some object or purpose of the conspiracy.
17 The overt act itself need not be criminal in
18 nature if it is considered separately and
19 apart from the conspiracy. It may be as
20 innocent as the act of a man walking across
21 the street or driving an automobile or using
22 a telephone. It must, however, be an act
23 which follows and tends toward the accomplish-
24 ment of the plan or scheme, and must be
25 knowingly done in furtherance of some object

1 or purpose of the conspiracy charged in the
2 indictment. There has been very properly
3 many references to one requirement of Section
4 1955 of the Federal Criminal Code, that there
5 be at least five participants. I tell you,
6 however, that this number nor any other number
7 other than two has no pertinency as to whether
8 or not there was a conspiracy. The end result
9 or goal of the conspiracy must, however, have
10 been an illegal gambling operation having at
11 least five participants. For example, two
12 persons can violate Section 371 of the Federal
13 Criminal Code if they conspire that an illegal
14 gambling business is to come into existence
15 with at least five participants, which if it
16 did exist would violate Section 1955 of the
17 Federal Criminal Code. There are four essen-
18 tial elements which are required to be proved
19 in order to establish the offense of conspiracy
20 as charged in the indictment. I have alluded
21 to some of them generally, but specifically
22 and firstly, it must be shown that the con-
23 spiracy described in the indictment was
24 willfully formed and was existing at or about
25 the time alleged. Secondly, that the defendant,

1 whose guilt you are considering, willfully
2 became a member of the conspiracy. Third,
3 that one of the conspirators thereafter know-
4 ingly committed at least one of the overt
5 acts charged in the indictment at or about
6 the time and place alleged, and fourth, that
7 such overt act was knowingly done in further-
8 ance of some object or purpose of the conspiracy
9 as charged. Now, if you should find beyond a
10 reasonable doubt from the evidence in the case
11 that the existence of a conspiracy charged in
12 the indictment has been proved, and that
13 during the existence of the conspiracy one
14 of the overt acts alleged was knowingly done
15 by one of the conspirators in furtherance of
16 some object or purpose of the conspiracy, then
17 proof of the conspiracy offense charged is
18 complete, and it is complete as to every
19 person found by you to have been willfully a
20 member of the conspiracy at the time the overt
21 act was committed, regardless of which of the
22 conspirators did the overt act.

23 Now, as stated before, the burden is
24 always upon the prosecution, the Government,
25 to prove beyond a reasonable doubt every

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1 essential element of the crime charged, and
2 the law never imposes upon the defendant in
3 a criminal case the burden or duty of calling
4 any witnesses or producing any evidence. While
5 the indictment charges that the conspiracy
6 existed from about September 1 to December 20,
7 1975, it is not essential that the Government
8 prove that the conspiracy started or ended on
9 or about those specific dates. It is sufficient
10 if you find that in fact the conspiracy was
11 formed and that it existed at or about the
12 period set forth in the indictment, and that
13 at least one of the overt acts was committed
14 in furtherance thereof within that period,
15 and at or about the time and place specified
16 in the indictment.

17 Now, in addition to the conspiracy count
18 in the indictment, which was Count 1, I will
19 next deal with Count 2, which charges each
20 of these five defendants with the actual
21 substantive violation of Section 1955. Before
22 I proceed to charge and explain the law with
23 respect to the substantive offense charged
24 in Count 2 of the indictment, I have a word
25 of caution. When I discussed the conspiracy

1 count, which was Count 1, I instructed you if
2 you first found the defendant to become a
3 member of a conspiracy, you then and only then
4 could consider acts and declarations of each
5 co-conspirator as evidence against all who
6 you found to have joined the conspiracy. This
7 rule does not apply and should not be applied
8 by you in your deliberation on this substan-
9 tive count, "substantive" being a term that
10 we tend to apply as opposed to a conspiracy,
11 upon which I am going to instruct you. In
12 considering this substantive count you are
13 not to consider what others may have said or
14 done. The substantive count may be established
15 only by evidence of a defendant's own conduct,
16 what he, himself, did or said. Thus when you
17 are considering the substantive count, Count
18 2, any admission or incriminatory statement
19 made or act done by one person may not be
20 considered as evidence against another person,
21 including a defendant, who was not present
22 and did not hear the statement made or see
23 the act done.

24 Count 2 of the indictment reads: That
25 continuously from September 1, 1975 through

1 December 20, 1975, in the Western District of
2 New York and elsewhere, Joseph A. Lombardo,
3 Donald A. DiCarlo, Richard Kelsey, Jack M.
4 Silverstein and Edward A. Cwczarzak, defendants
5 herein, unlawfully did conduct, finance, manage,
6 supervise, direct and own an illegal gambling
7 business in the form of an unlawful bookmaking
8 operation involving sporting events which
9 violated Article 225 of the Penal Laws of the
10 State of New York, all of which is in violation
11 of Section 1955, Title 18, United States Code."

12 Now, you will recall in my instructions
13 with regard to the conspiracy count, Count 1,
14 I fully discussed and instructed you with re-
15 gard to Section 1955. Of course, that discussion
16 was directed to an explanation of the unlawful
17 activity to which the claimed conspiracy was
18 allegedly directed, and because I am now
19 instructing you on the substantive charge,
20 which alleges each defendant actually violated
21 Section 1955, I will out of an excess of caution
22 again discuss that section with you, and Section
23 1955 of Title 18, United States Code, provides
24 in pertinent part: "whoever conducts, finances,
25 manages, supervises, directs or owns all or

1 part of an illegal gambling business shall
2 be punished as the law provides." An illegal
3 gambling business is defined in Section 1955
4 as being firstly one that is in violation of
5 the law of New York State in this instance
6 and, secondly, involves five or more persons
7 who conduct, finance, manage, supervise,
8 direct or own all or part of the business which
9 has been or remains in substantially continuous
10 operation for a period in excess of thirty
11 days or has a gross revenue of \$2000 in any
12 single day.

13 Now, in order to establish this substantive
14 offense under Section 1955, the following
15 essential elements must be proved by the
16 Government beyond a reasonable doubt: Firstly,
17 that there was a gambling business in the form
18 of a sports bookmaking operation being conducted
19 in the Western District of New York. Second,
20 that such gambling business was in violation
21 of the laws of the State of New York. I have
22 already told you that under New York State
23 law bookmaking means advancing a gambling
24 activity by unlawfully accepting bets from the
25 public as a business, rather than in a casual

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1 or personal way, upon the outcome of future
2 contingent events not under the bettor's control,
3 that a person violates New York State law when
4 he knowingly advances or profits from such
5 unlawful gambling activity. Now, thirdly in
6 the elements, that such gambling activity was
7 in substantially continuous operation for a
8 period in excess of thirty days or had a gross
9 revenue of \$2000 in any one day and, again, the
10 Government need not prove both of those, and
11 it is sufficient if the Government proves
12 either. If you find that bets placed in any
13 single day in that time span totalled at least
14 \$2000, that is sufficient upon which to base
15 a finding that the business had a gross revenue
16 in that amount on that date. If you find there
17 was an illegal gambling business in substan-
18 tially continuous operation in excess of thirty
19 days, it does not matter whether the business
20 made a profit or whether it lost money or
21 whether in fact then it did have bets on any
22 single day in excess of \$2000. The fourth
23 element, that five or more persons were involved
24 in the gambling operation as persons who con-
25 ducted, financed, managed, supervised, directed

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1 or owned all or part of the business. I
2 have already defined for you what those terms
3 mean. And fifth, as to any particular defend-
4 ant, that he participated in this gambling
5 business in at least one of the roles provided
6 by the statute, that is, in conducting it,
7 in financing it, in managing it, in super-
8 vising it, in directing it or in owning the
9 whole or part of the business. To establish
10 this element of the charge the Government must
11 establish as to any particular defendant that
12 his participation in the business was done
13 with guilty knowledge and with criminal intent
14 to violate the statute. Now, in order to
15 find that any one of the defendants is guilty
16 of violating Section 1955, you must find that
17 at least five people did unlawfully -- I
18 apologize for reciting this litany, it is in
19 the statute and important -- did unlawfully
20 conduct, finance, manage, supervise, direct
21 or own all or a part of an illegal gambling
22 business in the form of an unlawful bookmaking
23 operation which violated the provisions of
24 Article 225 of the Penal Law of the State of
25 New York. In addition, you must find that at

1 least five people were involved in the illegal
2 gambling activity for a period of in excess of
3 thirty days or at least five people were involved
4 during any one day when the illegal gambling
5 activity had a gross revenue of \$2000 or more.
6 Now, in this respect, in the absence of finding
7 that at least five people were involved in an
8 illegal gambling activity -- or illegal gambling
9 activities I should say -- for a full thirty
10 days or more or at least five people were
11 involved in the illegal gambling activities
12 during any one day when the gross revenue
13 exceeded \$2000, none of the defendants could
14 be found to have violated Section 1955. You
15 have heard testimony that certain individuals
16 were engaged in activities such as taking
17 bets over the telephones from bettors, giving
18 odds or the line on sporting events, keeping
19 financial records, including bottom sheets,
20 and transmitting pay and collect figures to
21 others. If you find that these individuals
22 rendered material assistance in the conduct
23 of the gambling operation which is charged
24 to the indictment, then you may find they
25 were involved in the conducting of such gambling

1 business and maybe included as part of the
2 minimum five persons whose activities are an
3 essential element of the crime charged. The
4 issue of whether or not they were so involved
5 is a question of fact for you to decide.
6 Counsel have discussed the existence of two
7 separate and independent businesses. If you
8 find there is merit to what was said, that
9 there were really two, you cannot convict any
10 individual defendant unless you find the busi-
11 ness to which he was connected involved five
12 or more persons. In other words, if you do
13 find two separate or independent businesses
14 existed but neither one involved five or more
15 persons, as I have defined that term to you,
16 you must acquit all of the defendants. However,
17 if you do find two separate, independent
18 businesses existed but only one involved five
19 or more persons, you can convict only those
20 defendants involved with that business, and
21 you must acquit the defendants involved solely
22 with the other business. If you find there
23 were two groups, then you must determine
24 whether or not this really was one business,
25 and in such determination you can take into

1 account all of the associations that you find
2 between them to determine whether or not they
3 were casual, whether or not they were inter-
4 mittent, whether or not they were essential
5 to the carrying on of the business. If they
6 carried out whatever was done through a spirit
7 of friendship and it was not necessary for the
8 carrying out of the other business that those
9 services be provided, then of course the busi-
10 ness or the association, whatever it was, would
11 not add up to a single business. If you find,
12 on the other hand, that one could not operate
13 without the other, and there was some kind of
14 an essential connection between the two in
15 carrying out their function in this gambling
16 business, then you may come to the other
17 conclusion and find there was a single business.

18 There has been argument and evidence con-
19 cerning whether the defendant DiCarlo was
20 in business for himself. Such a finding by
21 you would not necessarily foreclose your
22 finding that he also was a participant in the
23 other gambling operation. He could be an
24 independent businessman and a participant,
25 not by the same acts, but at the same time.

1 Now, I had mentioned unlawfulness, and
2 unlawful as regard to gambling is defined in
3 the New York Penal Law as gambling not speci-
4 fically authorized by law. You will note that
5 in describing the elements of the crimes I
6 have said that the defendants must have acted
7 knowingly and intentionally, and this does not
8 mean the defendants must have been aware that
9 their conduct was criminal or that it violated
10 any law of the United States, it simply means
11 that they must have known what they were doing,
12 that they were acting voluntarily, deliberately
13 or on purpose, and not because of mistake,
14 accident, carelessness or other innocent
15 reason. In determining the defendants' intent,
16 and it is obviously impossible to look into
17 their minds, however, intent and knowledge
18 may be inferred from their own conduct, from
19 their acts, from their statements and from
20 all of the surrounding circumstances.

21 Now, an unlawful act is done intentionally
22 if it is done voluntarily and willfully, and
23 with the specific intent to do something the
24 law forbids, that is, with bad purpose either
25 to disobey or disregard the law. Intent is

1 the purpose or aim or state of mind with which
2 a person acts or fails to act. Ordinarily it
3 is reasonable to infer that a person intends
4 the natural and probable consequences of his
5 acts, knowingly done or knowingly omitted to
6 be done. So in the absence of evidence in
7 the case which leads you to a different or
8 contrary conclusion, you may draw the inference
9 and find that any person involved intended
10 such natural and probable consequences as one
11 standing in like circumstances and possessing
12 like knowledge would reasonably have expected
13 to result from any act knowingly done or
14 knowingly admitted. An act or failure to
15 act is knowingly done if it is done voluntarily
16 and intentionally, and not because of mistake
17 or accident or other innocent reason, as I
18 have already noted. Intent may be proved by
19 indirect or circumstantial evidence. As I have
20 noted, it rarely can be established by any
21 other means. Witnesses may see and hear and
22 be able to give direct evidence of what a
23 person does or fails to do, but there can be,
24 of course, no eyewitness account of the
25 state of mind with which acts were done or

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1 omitted. What a person does or fails to do
2 may indicate to you either intent or lack of
3 intent to act or to fail to act. Now, unless
4 otherwise instructed, in determining any issue
5 involving intent, you may consider all of the
6 facts and circumstances which are in evidence
7 in the case which may aid you in determining
8 state of mind.

9 We come now to the final count of the
10 indictment, which is Count 3. This count of
11 the indictment is directed only against one of
12 the defendants who are named in the indictment,
13 this being the defendant Joseph A. Lombardo,
14 and I will quote Count 3: "That on or about
15 December 20, 1975, in the Western District of
16 New York, Joseph A. Lombardo unlawfully did
17 destroy certain property, namely, flash paper,
18 in order to prevent its seizure before the
19 said property could be seized by Special Agents
20 Peter J. Sofia and John E. Gill, Jr. of the
21 Federal Bureau of Investigation who were then
22 and there duly authorized by law to search for
23 and seize the said property, all of which was
24 in violation of Section 2232 of Title 18,
25 United States Code." That section says in

1 pertinent part: "Whoever before, during or
2 after seizure of any property by any person
3 authorized to make searches and seizures, in
4 order to prevent the seizure or securing of
5 any goods, wares, or merchandise by any person,
6 destroys the same, shall be guilty of an
7 offense against the United States."

8 In order to find the defendant Joseph A.
9 Lombardo guilty as charged in Count 3 of the
10 indictment, you must be convinced beyond a
11 reasonable doubt of each of the following
12 elements: First, that he did in fact destroy
13 certain property, namely, flash paper, on or
14 about December 20, 1975. Secondly, that his
15 actions in destroying the flash paper occurred
16 either before, during or after the seizure of
17 the property by Special Agents Sofia and Gill.
18 Third, that the Special Agents Sofia and Gill
19 were authorized to make a search and seizure
20 of certain property on Joseph A. Lombardo's
21 person, in his automobile or at his residence.
22 You are not, however, to consider whether
23 the search warrants for defendant Lombardo's
24 person and his automobile were valid. The
25 legal validity of these documents is a question

1 of law for me to decide, and it is not for
2 your consideration. It is my instruction to
3 you that the respective warrants were valid.
4 Sofia and Gill were acting under proper authority
5 in conducting the search and in attempting to
6 make the seizure, and you must decide whether
7 Lombardo knew or believed or reasonably should
8 have known and believed that Sofia and Gill
9 were so acting. Now, the fourth element, it
10 must be shown and you must find that the defen-
11 dant Lombardo's actions in burning the flash
12 paper were done with the intent to prevent
13 Sofia and Gill from securing and seizing it.
14 Now, intent in this regard, as in others,
15 means only that the defendant Lombardo acted
16 voluntarily and not by accident, and at the
17 time of his action that he knew or believed
18 or reasonably ought to have known or believed
19 that a search and seizure was about to occur
20 and, as I already told you, you ordinarily
21 cannot prove it directly. There is no way of
22 fathoming or scrutinizing the operation of
23 the human mind, but you are entitled to infer
24 the defendant's intent from the surrounding
25 circumstances, and you can consider any

statement or act made or done or omitted by
defendant Lombardo, and all of the other facts
and circumstances in evidence which indicate
his state of mind. It is ordinarily reasonable
to infer that a person intends, as I have said
before, the natural and probable consequences
of acts knowingly done or knowingly omitted.
You must remember that Count 3 charges only
Joseph A. Lombardo with this offense against
the United States. In addition, his alleged
actions, which are charged in Count 3 of the
indictment, are not included as any overt act
committed in furtherance of the conspiracy
which is charged in Count 1. You must not
consider any evidence offered solely in regard
to Count 3 when you are considering Count 2
or Count 1 of the indictment or when you are
considering the guilt or non-guilt of any other
defendant. Government's Exhibit 119, for
example, the pink box and the remainder of
the piece of what Mr. Duncan said was flash
paper, is an example of such evidence. Now,
there are certain rules of law, some of which
I have already mentioned, which are common to
all criminal cases and which you must apply

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1 in reviewing the evidence which is before you.
2 A basic rule in all criminal cases is that a
3 defendant is presumed to be innocent, and that
4 presumption of innocence remains with each
5 defendant throughout the trial and continues
6 to exist until such time as each one of you
7 is convinced beyond a reasonable doubt by
8 legal and competent evidence that the defendant
9 is guilty of the offense or the offenses charged.
10 The burden of proof that a person is guilty
11 beyond a reasonable doubt rests with the Govern-
12 ment at all times, it never shifts to a defen-
13 dant. In order to sustain its burden, the
14 Government must present proof which is suffi-
15 ciently strong to convince each of you of
16 each defendant's guilt beyond a reasonable
17 doubt. The requirement that the prosecution
18 prove a defendant's guilt beyond a reasonable
19 doubt extends to every element of a crime or
20 crimes charged against the defendant. However,
21 in determining whether the guilt of a defendant
22 as to each and every essential element of the
23 crime has been established beyond a reasonable
24 doubt, you are not limited to the proof from
25 the Government's witnesses. If you are

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1 satisfied from a review of all of the evidence
2 in the case, both the Government's and the
3 defendants', of which there was in this case
4 very little, or by the defendants' cross
5 examination of the Government's witnesses that
6 the evidence establishes guilt beyond a reason-
7 able doubt, you may convict a defendant. On
8 the other hand, if you have a reasonable doubt
9 at any point with respect to guilt, you must
10 acquit the defendant. You will, of course,
11 separately weigh and determine the evidence
12 as to each count of the indictment, that is,
13 you will determine the guilt or innocence of
14 each defendant as to each count of the indict-
15 ment separately.

16 I mentioned reasonable doubt. A reasonable
17 doubt is a fair doubt which is based upon
18 reason and upon common sense, and which arises
19 from the state of the evidence. Now, of course,
20 it is rarely possible to prove anything to an
21 absolute certainty. Proof beyond a reasonable
22 doubt therefore is established if the evidence
23 is such as you would be willing to rely upon
24 and act upon in the most important of your
25 own affairs. A defendant, however, is not to

1 be convicted upon mere suspicion or conjecture.
2 A reasonable doubt may arise not only from the
3 evidence produced but also from a lack of
4 evidence. Because the burden is upon the
5 prosecution to prove the accused guilty beyond
6 a reasonable doubt of every essential element
7 of the crime charged, a defendant has a right
8 to rely upon the failure of the prosecution to
9 establish such proof. A defendant may also
10 rely upon evidence brought out on cross examina-
11 tion of witnesses for the prosecution. The
12 law does not impose upon a defendant the duty
13 of producing any evidence and, as I have said,
14 and I reiterate, a reasonable doubt may arise
15 not only from the evidence produced but from
16 a lack of evidence. Now, remember that a
17 reasonable doubt is such a doubt as is based
18 upon reason and as appeals to your powers of
19 logic. It is a doubt which arises out of some-
20 thing tangible in the evidence in the case or
21 something lacking in the case. It must be
22 distinguished from a doubt which might be based
23 upon emotion, such as upon a whim or upon a
24 fancy. If you feel uncertain and are not fully
25 convinced that the defendant is guilty of the

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1 crimes charged, and you believe you are acting
2 in a reasonable manner, and you believe that
3 a reasonable man or woman in any matter of
4 like importance would hesitate to convict
5 because of such a doubt as you have, that is
6 a reasonable doubt, to the benefit of which
7 the defendant is entitled. If you have such
8 a doubt you must acquit. As I have stated, a
9 reasonable doubt in your mind as to any essen-
10 tial element of the crime entitles the defendant
11 to acquittal of the crime and count involved.
12 However, the rule that the Government must prove
13 every essential element of the crime beyond a
14 reasonable doubt does not mean that you must
15 believe the testimony of every Government
16 witness as being true beyond a reasonable doubt
17 or that every piece of evidence the Government
18 has offered is true beyond a reasonable doubt.
19 It only means that the credible evidence as
20 weighed and found by you under my instructions,
21 and as viewed as a whole, must establish every
22 essential element of the crime and each defen-
23 dants' guilt beyond a reasonable doubt.

24 As the sole judges of the facts, you must
25 determine which of the witnesses you will

1 believe, and what portion of their testimony
2 you accept and what weight you attach to it.
3 At times during the trial I sustained objec-
4 tions to questions without permitting the
5 witness to answer or where an answer was made
6 I may have instructed that it be stricken from
7 the record and that you disregard it and dis-
8 miss it from your minds. You may not draw
9 any inference from an unanswered question,
10 nor may you consider testimony which has been
11 stricken in reaching your decision. The law
12 required that your decision be made solely
13 upon the competent evidence before you, and
14 such items as I have excluded from your con-
15 sideration are not legally admissible and must
16 not be considered. Under no circumstances
17 should you be influenced by the number of
18 witnesses the Government has called or by the
19 number of documents received in evidence or
20 by the length of this trial. It is the quality
21 of the testimony and other evidence which
22 counts, not the quantity.

23 Each defendant is entitled to have his
24 guilt or innocence as to each of the offenses
25 charged determined from his own conduct and

1 from the evidence which applies to him, as if
2 he were being tried alone. The guilt or
3 innocence of any one defendant of any of the
4 crimes charged should not influence your ver-
5 dicts respecting the other defendants. You
6 may find any one or more of the defendants
7 guilty or not guilty. Nevertheless, you must
8 relate the evidence only as to that defendant
9 or those defendants toward whom it is received.
10 In any event, you must determine the guilt of
11 each defendant as to each separate charge by
12 giving separate consideration to the evidence
13 which applies to him as to each count.

14 There is evidence in the case that the
15 defendant Silverstein and in one instance the
16 defendant Gwczarzak made certain statements.
17 Evidence relating to any statement or act
18 claimed to have been made or done by a defendant
19 outside of court and after a crime has allegedly
20 been committed should always be considered with
21 caution and weighed with great care, and all
22 such evidence in the case must convince you
23 beyond a reasonable doubt that the statement
24 or act was knowingly made or done.

25 A statement or act is knowingly made or

1 done if it is done voluntarily and intentionally,
2 and not because of mistake or accident or some
3 other innocent reason. If the evidence in the
4 case does not convince you beyond a reasonable
5 doubt that a statement was made voluntarily or
6 intentionally, you should disregard the statement
7 entirely. On the other hand, if the evidence
8 in the case shows you beyond a reasonable doubt
9 that a statement was in fact made voluntarily
10 and intentionally by a defendant, you may con-
11 sider it as evidence in the case and against
12 that defendant.

13 Now, I repeat that the defendant in an
14 American court is under no obligation to give
15 any evidence whatsoever. You should not draw
16 any inference from the failure of the defendant
17 in this case to take the stand. A defendant
18 has the right to go to you, the jury, on the
19 contention that the evidence of the prosecution
20 is insufficient to warrant his conviction under
21 the rules of law which I have been outlining
22 to you.

23 You also are the sole judges of the cred-
24 ibility, which is the believability of the
25 witnesses, and the weight their testimony

1 deserves. You should carefully scrutinize the
2 testimony given, and the circumstances under
3 which each witness testified, and every matter
4 in evidence which tends to indicate whether
5 the witness was worthy of belief. You bring
6 to this task your own experience in your re-
7 spective lives which has enabled you to varying
8 degrees to decide whether someone is telling
9 the truth. Judge each witness' intelligence,
10 motive and state of mind, and demeanor and
11 manner while he or she was on the stand. Judge
12 also any relation such witness may bear to
13 either side of the case, the manner in which
14 each witness might be affected by the verdict,
15 and the extent to which, if at all, each witness
16 is either supported or contradicted by other
17 evidence. Of course, the mere fact that the
18 testimony of a witness is inconsistent or
19 that there are other discrepancies in such
20 testimony does not mean that you must reject
21 the witness' credibility. You must determine
22 whether the inconsistency or discrepancies are a
23 result of falsification of whether, on the other
24 hand, it is the result of innocent miscalcula-
25 tion or inaccurate observation. If you find

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1 that any witness has lied with respect to any
2 material portion of his or her testimony, you
3 may regard that portion which you find to be
4 unbelievable or false or you may, if you desire,
5 disregard the witness' entire testimony. In
6 evaluating credibility you will, of course,
7 determine whether or not the testimony of a
8 given witness is inherently improbable or
9 contradictory with respect to any material fact
10 by other evidence in this case. Now, also you
11 will not find that a witness has lied if you
12 find that the witness so testified out of mere
13 mistake or inadvertence.

14 The rules of evidence ordinarily do not
15 permit a witness to give opinions or conclu-
16 sions but in exception to this rule exists as
17 to those witnesses who we call expert witnesses.
18 These are witnesses who by education and experience
19 have become expert in some art, science, pro-
20 fession or calling, and they are entitled to
21 state an opinion as to relevant and material
22 matters in which they profess to be expert.
23 They may also state their reasons for the
24 opinion. Mr. Duncan and Mr. Holmes were such
25 witnesses in this case in their respective

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1 areas. You should consider each expert opinion
2 received in evidence in this case and give to
3 it such weight as you think it deserves. If
4 you should decide that the opinion of an
5 expert witness is not based upon sufficient
6 education and experience or if you should
7 conclude that the reasons given in support of
8 the opinion are not sound or that the opinion
9 is outweighed by other evidence, you may dis-
10 regard the opinion completely.

11 There are two types of evidence which you
12 may properly employ in finding a defendant
13 guilty or not guilty of an offense. Proof may
14 consist of the testimony of those who witnessed
15 a defendant's conduct and who have testified
16 to that conduct in the course of the trial,
17 and this be called direct evidence or eyewitness
18 evidence. Although the Government may not be
19 able to produce eyewitnesses to the conduct
20 on which guilt depends, this does not mean
21 that it cannot produce proof sufficient to
22 support a verdict. You are permitted to draw
23 from one fact the existence of another if reason
24 and experience support the inference, that is
25 to say, you may draw from facts which you find

1 to have been proven such reasonable inferences
2 as seen justified by reason and logic in light
3 of your own experience in life.

4 Proof of a chain of circumstances pointing
5 to the commission of an offense by an accused
6 is called circumstantial evidence. You may
7 consider and find that both types of evidence,
8 direct and circumstantial, bear on the question
9 of the innocence or guilt of the defendant. As
10 a general rule the law makes no distinction
11 between direct and circumstantial evidence, but
12 simply requires that before convicting a de-
13 fendant you be satisfied of his guilt beyond
14 a reasonable doubt.

15 Basically an inference which I have men-
16 tioned, is nothing more than a deduction or
17 a conclusion, which reason and common sense
18 lead you to draw from facts which have been
19 proven. Any inference which you draw from the
20 evidence must reasonably flow from the evidence,
21 and must be based upon facts established by
22 the evidence. Because a permissible inference
23 in law must flow naturally from and be based
24 upon facts established by the evidence, it
25 follows that you may not base further inferences

1 merely on inferences previously drawn, an
2 inference cannot be drawn from another inference.
3 If in the course of your consideration of all
4 of the evidence as to a defendant you find
5 certain evidence admits equally of two inferences,
6 one which supports innocence and one which
7 supports guilt, you must accept the inference
8 supporting innocence and reject the inference
9 supporting guilt.

10 You are instructed as a matter of law that
11 you are not to be influenced by the fact that
12 the Government of the United States is a party
13 to this action, for I charge you that the
14 Government is to be considered the same as
15 any other party, it has the role of being the
16 prosecutor in the case, and also its attorney,
17 Mr. Endler, is to be considered as any other
18 lawyer would be considered.

19 It is your duty merely to determine the
20 guilt or innocence of each defendant, and you
21 should not concern yourselves in any way with
22 the punishment any defendant may receive if
23 convicted because that is my concern and mine
24 alone.

25 As I said, I am sending a copy of the

1 indictment to the jury room with you for your
2 reference, and it has been marked Court Exhibit
3 A. Bear in mind, as I have said before, the
4 indictment is not evidence. It is merely a
5 device used in our courts whereby a defendant
6 is advised of the charges which have been
7 lodged against him. You should not consider
8 it as proving or tending to prove anything
9 whatsoever. A separate crime of offense is
10 charged against each of the defendants in each
11 of Counts 1 and 2 of the indictment and against
12 Mr. Lombardo in Count 3. Each offense and
13 the evidence pertaining to it should be con-
14 sidered separately. The fact that you may
15 find all or some of the accused guilty or
16 innocent of one of the offenses charged should
17 not control your verdict as to any other offense
18 charged against any of the defendants. Your
19 verdict as to the guilt or innocence of each
20 of the defendants on each count of the indict-
21 ment must be reached unanimously, with all
22 twelve of you agreeing on the result. At
23 any time during your deliberations you may
24 return into court and report your verdict of
25 guilty or not guilty as to any defendant

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WESTERN DISTRICT OF NEW YORK

1 concerning any count as to which you have
2 unanimously agreed. You can find fewer than
3 all five of these defendants guilty of Count
4 1 or of Count 2, according to my instructions.
5 Of course, only defendant Joseph Lombardo can
6 be found guilty of Count 3.

7 If you decide that the witnesses were
8 mistaken as to the voice and other identifica-
9 tion of defendant Richard Kelsey, and that
10 such person was in fact his brother, James
11 Kelsey, you must, of course, acquit defendant
12 Richard Kelsey, but you will still separately
13 decide the guilt or innocence of each other
14 defendant, and you could consider that James
15 Kelsey was a participant even though he will
16 not, of course, be considering his guilt or
17 innocence.

18 Now, finally, in the oath that each of you
19 took at the time you were sworn in as members
20 of the jury, you swore that each of you would
21 well and truly try this issue joined in this
22 case and a true verdict give therein according
23 to the evidence so help you God. I suggest
24 to you that if you follow that oath and you
25 try the issues without combining your thinking

1 with any emotion that you will arrive at a
2 true and just verdict. It must be clear to
3 you that once you get into an emotional state,
4 if you let bias or sympathy or prejudice
5 interfere with your thinking, then you will
6 not arrive at a true and just verdict. As
7 you deliberate, ladies and gentlemen, please
8 be careful to listen to the opinions of the
9 other jurors, and ask for an opportunity to
10 express your own views. No one juror holds
11 center stage in the jury room, and no one
12 juror controls or monopolizes the deliberations.
13 If after listening to the other jurors, and
14 if after stating your own views, you become
15 convinced that your view is wrong, do not
16 hesitate because of stubbornness or pride of
17 opinion to change your view. On the other
18 hand, do not surrender your honest conviction
19 solely because you are outnumbered.

20 As I have said, your verdicts must be
21 unanimous, they must represent the absolute
22 conviction of each one of you, and I shall
23 ask for your verdict as to each defendant on
24 each count.

25 As you retire to your deliberations, as

1 the first order of business you should select
2 one of your number to speak for you when you
3 return into court or when you otherwise have
4 to communicate with me. All communication
5 from your deliberation room will be by a note
6 that you will hand to the deputy marshal who
7 will be on duty outside of your deliberation
8 room, and he or she will see that it gets to
9 me. Do not ask the deputy marshal any ques-
10 tions concerning your duties. By means of a
11 note you can ask me questions, you can request
12 a clarification of my instructions on the law
13 or a reading of my instructions or all or part
14 of the testimony of any witness. Use a note
15 also to advise me when you have reached your
16 verdicts, or in appropriate circumstances,
17 when you find yourselves so deadlocked that
18 you fail unanimity is impossible. Never tell
19 me or anyone else how your voting stands at
20 any time, except to say in open court that a
21 verdict or verdicts have been reached unanimously.

22 Gentlemen, are there any exceptions or
23 requests and, if so, do you want to be heard
24 outside the presence of the jury?

25 ME. ENDLER: Yes, your Honor.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

Plaintiff,

-vs.-

Cr. 76-3

JOSEPH A. LOMBARDO,
DONALD A. DICARLO a/k/a "TONY",
RICHARD KELSEY,
JACK M. SILVERSTEIN,
EDWARD A. OW CZARZAK a/k/a "O-Z",

ORDER

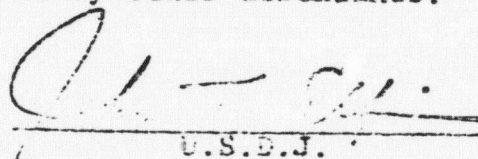
Defendants.

Defendant Lombardo's February 19, 1976 motions for orders directing that any transcribed proceedings before the Grand Jury be provided to such defendant and that he be tried separate and apart from his co-defendants hereby are denied.

The motion, filed June 18, 1976, of defendants Kelsey, Silverstein and Owczarzak for hearings regarding admissibility of certain electronic eavesdropping and suppression of tangible evidence and severance of Count III of the indictment hereby is denied. Decision on said defendants' motion for an "audibility hearing" is reserved, except that I will conduct such a hearing in such form and substance as I shall deem appropriate and that said hearing will commence at 4:00 p.m. on August 17, 1976.

The June 23, 1976 motion by defendant DiCarlo (which was orally embraced by defendant Gwoszczak at the June 28, 1976 argument) for the striking of their aliases from the indictment is hereby granted and said indictment is hereby deemed reformed accordingly. The Government may allude to such aliases in its opening statement if the Government in good faith expects to prove the employment of such aliases by said defendants or their employment by others in referring to or addressing said defendants. Defendant DiCarlo's motion for severance or dismissal of Count III is hereby denied. His motion for a hearing concerning the seizure of a certain automobile is hereby denied without prejudice to its separate consideration and determination out of the context of the instant criminal proceeding. His motion for a hearing re and suppression of identification testimony is hereby denied without prejudice to its renewal as said defendant may deem appropriate during trial. His motions for a hearing re electronic eavesdropping evidence and for an 'audibility hearing' are hereby determined according to the above disposition of same motions by other defendants.

Dated: Buffalo, N.Y.
August 12, 1976


U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

-vs.-

Cr. 76-3

JOSEPH A. LOMBARDO,
DONALD A. DICARLO,
RICHARD KELSEY,
JACK M. SILVERSTEIN,
EDWARD A. ONCLARZAK

MEMORANDUM

and

ORDER

At the end of 13 & 1/2 days of trial (including jury selection and deliberations) a jury convicted all defendants of the charges specified in the indictment -- namely, conspiracy to violate 18 U.S.C. §1955, violation of 18 U.S.C. §1955 and (defendant Lombardo only) of 18 U.S.C. §2382. Defendants have moved for judgments of acquittal n.o.v., for a new trial under F.R.Cr.P. 33 or for a dismissal under F.R.Cr.P. 43(b). (No particulars have been set forth orally or in papers in support of the latter, raised for the first time.).

Defendant Onclarzak contends that evidence of the product of court-authorized wiretaps should have been suppressed as well as said defendant's admission to Government agents after he had told them that he wanted to remain silent until he had had an opportunity to consult an attorney and an agent's identification of said defendant's voice. These contentions were respectively ruled upon, adversely to

said defendant, prior to the verdict. No persuasive reason is advanced for changing such rulings. Defendant Swinarsak claims prejudice due to my refusal to sever Count III (wherein defendant Lombardo alone was charged with a violation of section 2232) from the trial of the remaining counts. This also was ruled on earlier by me with no reasons shown for any alteration of such decision. It is argued that the testimony was inconsistent but, if it was, its analysis and orientation was the jury's task and there is inadequate basis for disturbing that body's work result. Lastly, such defendant complains of the excusal of two of the original twelve jurors and the seating in their respective places of the two alternate jurors. Original juror Mason had been excused after 7 & 1/2 days of trial in order that he might go forth on a pre-arranged vacation and alternate juror #1 took his place. Following 3 & 1/2 additional trial days the Labor Day weekend was reached and, as of the Friday before that holiday, it was made known to me and to counsel that original juror Gardner was duty-bound to preside over a meeting of school bus drivers on the morning of Tuesday, September 7th. He was told by me at the end of Friday's session that it was hoped that he could find a way to be present as a member of the jury on Tuesday. At the time of convening the jury in the courtroom on Tuesday, juror Gardner was not present and alternate juror Fox was put in his

place. The case then proceeded to summations and instructions and deliberation, with further deliberation and verdicts on the following day. Defendant's complaint, basically, is that Fox was allowed to participate as a deliberating and voting juror. Defendants (who were exercising their preemptive challenges jointly) had used their single such challenge as to alternate jurors on one of the two such originally seated and Fox came into the box as the putative alternate juror #2 when defendants were bereft of any preemptive striking power. Fox was employed in a part-time capacity by the United States Internal Revenue Service in a civil auditing capacity and was striving to gain a permanent appointment with the Service. No part of his duties directly or indirectly concerned criminal investigations or prosecutions and his answers unequivocally showed his lack of predisposition in this case. At a sidebar conference, defendant Gwozdzak and the other defendants contended that Fox should be ousted for cause. I refused, the unchosen jurors were excused and the chosen fourteen (unsworn) were instructed to return the following morning. Defendant Gwozdzak complains of the denial of the challenge for cause and of the seating of juror Mason when it was known to all that he was going on vacation at the end of the second trial week and of the seeing allowance to juror Gardner to make his own decision whether he would be present in court on the morning of

September 7th. Suffice to say, I had every expectancy when the jury was being selected that the verdicts (if any) would be rendered before Mason's scheduled vacation, and I had reasonable hope on Friday the 3rd (having had no advance knowledge or warning that he was to be involved in any meeting or event on the 7th) that Gardner would find means to be present on the morning of the 7th, and I had and have full confidence in juror Fox's complete lack of bias, prejudice or predisposition. The seating of Fox affords defendant Gwczarzak insufficient ground for relief. His motions hereby are denied.

Defendant DiCarlo contends that the indictment insufficiently states a crime, that section 1955 is unconstitutional, that Count III ought to have been severed, that the wiretap evidence should have been suppressed, that his mid-trial motions for mistrial should have been granted, that Fox ought to have been dismissed for cause or not seated as a voting juror, that the verdict was contrary to the weight of the evidence and not supported by substantial evidence, that I erred in admitting certain (unspecified) evidence and that I refused to charge that a "mere employee" could not be found to be one who conducted the gambling business. His motions for an arrest and setting aside of the verdicts and for a dismissal of the indictment or for a new trial are hereby denied.

Defendants Kalsey and Silverstein joined in the motions of defendant Owczarzak and such are hereby denied as to them.

Defendant Lombardo asks for arrest of judgment and for judgment n.o.v. or for a new trial. His adoption of defendant DiCarlo's contentions gains him the same ruling as above set forth. Additionally, he broadsidedly asserts that Article 225 of the New York State Penal Law is unconstitutional but I find no basis for such holding. He also contends that I erred in not severing Count III from the remaining counts for trial purposes. At first blush it appears totally untenable for this defendant, being the sole person charged in Count III, to claim prejudice or error through non-severance. However, he claims, this joint trial barred him from calling defendant DiCarlo to the witness stand on behalf of defendant Lombardo because DiCarlo as a defendant could not be compelled to take the witness stand in a trial in which he himself was a defendant. Lombardo must be arguing that he would have been able to have DiCarlo's testimony in a separate trial of Count III (DiCarlo's availability would have been no different on the trials of the other two counts of which all defendants stood charged); but there is no showing, by argument or offer, what pertinent testimony DiCarlo could give concerning Lombardo's alleged destruction of gambling records as a Government agent was seeking to

execute a search warrant. Lombardo at the time and place was completely isolated from DiCarlo and was by himself in his personal automobile. Defendant Lombardo's motions also hereby are denied.

Dated: Buffalo, N.Y.
October 8, 1976

U.S.D.J.

1 MR. JAY: No, sir.

2 MR. BOREANAZ: None.

3 MR. NE MOYER: No, Judge.

4 MR. JAY: I haven't seen that, but --

5 THE COURT: All right, thank you, Mr. Schaller. Ladies
6 and gentlemen, we are going to adjourn for
7 today. We are actually going to adjourn into
8 one o'clock on Tuesday because of commitments
9 that I have all day Monday and on Tuesday
10 morning. Now, Mr. Mason, at the time of the
11 voir dire, you had indicated that you were
12 planning to start a vacation Monday, are those
13 plans still set?

14 MR. MASON: Yes, sir.

15 THE COURT: I told you at the outset that I would protect
16 you in that situation. You will be free to
17 go on that, and assuming, as I now do, that
18 you would not be appearing here at one o'clock
19 on Tuesday the 31st, I will at that time,
20 assuming Mrs. Brydalski is present, at that
21 time move Mrs. Brydalski as the first alternate
22 in your position as Juror Number Seven. Mr.
23 Walsh handed me a note that somewhat surprises
24 me, it may be my own inadvertence, but Mrs.
25 Grobe, you indicated that you are planning a

1 vacation I think?

2 MRS. GROBE: Yes.

3 THE COURT: All right. I will see you all at one o'clock,
4 except for Mr. Mason, on Tuesday. I would like
5 to know whether or not it would conflict with
6 anyone's personal plans if I ran until five
7 or six on that day? We will start at one and
8 quit -- I have been quitting at four -- if it
9 runs afoul of any personal plans, I will quit
10 at four, otherwise I would like to get the
11 extra time in if I can. All right, we will
12 start at one, and the present plans are that
13 I will go to not later than six o'clock. Again,
14 this is one of those longer recesses, and it
15 is more important that you remember my general
16 admonition. Keep your minds open on all of
17 the issues, while you are trying to retain
18 whatever recollection that is possible in this
19 type of case of the evidence that you have
20 been hearing, and do not talk about it among
21 yourselves or, most importantly, do not talk
22 to anyone else, and if anyone tries to talk
23 with any one of you, make sure I find out
24 about it right away. I will see you on
25 Tuesday at one o'clock.

1 there connected to any of the defendants that
2 should be allowed in to evidence.

3 MR. NE MOYER: There was something that could be traced on
4 that day, and apparently they didn't trace it.
5 The indication is there was a gun there. I
6 would think they would trace ownership of any-
7 thing like that.

8 MR. ENDLER: Do you want to have that in here?

9 MR. NE MOYER: I think you ought to have it in here.

10 MR. JAY: I have one other item that appears to be
11 imminent. In the selection of this jury we
12 exercised, I believe, all of our pre-emptory
13 challenges and some others that was given to
14 us by the Court. It appears now that one of
15 our jurors is going to be excused and replaced
16 with an alternate. The alternate -- of course,
17 we only had one challenge for the two alter-
18 nates -- it appears to me that the fact that
19 this juror was going to be gone within two
20 weeks, and it was known to all at the time, as
21 a matter of fact, I believe the juror, himself,
22 indicated that to the Court prior to the start
23 of jury selection, and I believe also that the
24 time frame of this trial was elicited by the
25 Court from Mr. Endler, at least as the Government's

1 case, and it was his indication that it would
2 be at least a three week trial, and we are
3 at the end of the second week and we are losing
4 one of our jurors. It seems to me --

5 THE COURT: I don't concur with your recollection of Mr.
6 Endler having said that, although I assume he
7 may have been open ended on the matter at the
8 best.

9 MR. JAY: In any event, I don't think that there was any
10 promise --

11 THE COURT: I will go along, certainly it was envisioned,
12 the possibility of going beyond a day was
13 certainly envisioned as a possibility by me.

14 MR. JAY: Yes, sir. And I think to protect the record,
15 on behalf of my client, I must object at this
16 point.

17 THE COURT: You all have objected to it. You are relating
18 to the original Alternate Number 2, who if Mr.
19 Mason is not here at one o'clock on Tuesday
20 will thereby become Alternate Number 1. You
21 all objected at the time he was seated, and
22 there was a request for additional alternates,
23 and I declined to allow that. You are on the
24 record on it already.

25 MR. JAY: My objection doesn't necessarily go to the

1 alternates, it goes to the factor that our
2 original jury, which was selected and sworn,
3 our jury was known, it appears, at the time it
4 was sworn that this would not be the jury
5 that would hear this case, that would actually
6 deliberate this case. That is what I object
7 to, not necessarily the qualifications or the
8 propriety of any of the alternates. But this
9 jury it was known at the time of the swearing
10 was not going to sit on this case, and that is
11 my objection.

12 THE COURT: All right, Mr. Jay. Anything further?

13 MR. NE MOYER: Your Honor, if Juror Number 2 ever sits, I
14 would consider that devastating.

15 THE COURT: You mean present Alternate Number 2, Mr. Fox?

16 MR. NE MOYER: I understand he is in the same building with
17 the FBI. He is an aspiring federal employee
18 with the Internal Revenue Service. I think
19 it would be grossly unfair if it came to pass
20 that he would sit.

21 THE COURT: Well, as I say, the record is protected by all
22 of you in that regard.

23 MR. NE MOYER: Thank you, Judge.

24 THE COURT: Nothing more? All right.

25
(Thereupon the court was in recess at 4:15 P.M.)

1 that would probably be all right. The first
2 day is usually handing out the material.
3 THE COURT: All right. That gives me a grasp of the
4 situation then. I will see what we are going
5 to do on it. You can walk right out here and
6 go out to the hall and go down the stairway
7 or the elevator. I will be calling you up-
8 stairs soon.

9
10 * * * * *

11
12 PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 1:15 P.M.

13
14 (Defendants present, counsel present, jury
15 absent.)

16
17 THE COURT: As I got back from lunch, gentlemen, I was
18 apprised of a juror problem which I did not
19 know the magnitude of, and it involves Mr.
20 Gardner, who is Juror #1, and I had known
21 pretty much from the outset because he had
22 come to me at the time we had the jurors come
23 in and indicated that he had a position of
24 responsibility in Lancaster concerning school
25 bussing, and he was in the process of revamping

1 all the routes completely and it necessitates
2 a lot of time on his part, and I told him that
3 I thought we would be able to work that out
4 during his jury service. He has not been able
5 to do it. Now, of course, he faces the opening
6 of school on Wednesday, the 8th. He says that
7 he has a meeting of his forty-four regular
8 drivers, and about ten additional drivers.
9 I got this from having had him in my chambers
10 just now with myself and with Mr. Noel. He
11 apprises me that he has a meeting of all these
12 men set up, men and women, I assume -- set up
13 for nine o'clock on Tuesday morning, and the
14 meeting would go, he anticipates, until eleven
15 or eleven thirty. He says he is responsible
16 for briefing them not only on the new routes,
17 he feels me in addition they have some system
18 of passes and a couple of other such involvements
19 that he feels makes it highly necessary that
20 he be there if he possibly can. Of course, I
21 gave no indication at that juncture. At the
22 same time I had in chambers, also on the record,
23 I had Alternate #1, Mr. Fox, who similarly has
24 a problem which involves his hope for getting
25 a full time appointment with the IRS. You

1 will remember he has a part time position there
2 now. He has in the past undergone one "training
3 program". The appointments to the full time
4 positions are merit based or based anyway on
5 going through three training sessions. You
6 have a one upmanship on somebody who has only
7 gone through two, who has a one upmanship on
8 somebody who has gone only through one. So
9 they have a training class which lasts three
10 weeks which is -- I guess they have two of
11 them getting underway, one is getting underway
12 Tuesday morning, and the other is going to
13 get underway Wednesday morning. He normally
14 would go into the one on Tuesday morning. He
15 can delay as long as Thursday morning on getting
16 into it. That is the totality of the situation,
17 and I find myself somewhat impressed with the
18 hardship that Mr. Gardner presents, and without
19 making any separate inquiry, and taking it on
20 its face value, he has throughout indicated
21 that he had a position of pretty much sole
22 responsibility, as far as the school bus
23 transportation is concerned for his particular
24 school district. Now, there are two things
25 involved, and I, from my part, I put aside the

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WESTERN DISTRICT OF NEW YORK

1 pact that was made earlier at the conclusion
2 of the selection of the jury, upon the supposed
3 bias or other lack of qualifications of Alternate
4 #1, Mr. Fox, and nevertheless I do know that
5 contentions were made by defense counsel against
6 his sitting, I remember particularly Mr. Jay,
7 and I mentioned that. We lost one juror and
8 have taken our initial Number One and put her
9 in place of Juror #7, Mr. Mason, who we knew
10 at the outset was going on vacation beginning
11 on the 30th. So I would like to hear any
12 suggestions that any of you have to put to
13 me, while I make up my mind on the situation.

14 MR. NE MOYER: Your Honor, I certainly would not oppose
15 excusing Alternate #1 if it came down. I
16 don't know what course others would take, but
17 I would rather go with eleven people on the
18 jury than have him in.

19 MR. DOYLE: I would be less than candid with the Court if
20 I didn't say I was enormously concerned with
21 Alternate #1. I'm sure the Court recalls that
22 I asked for extra challenges, I challenged
23 for cause, and I can only at this time parrot
24 Mr. NeMoyer's concern expressed when we
25 excused Alternate #1 some time ago, that the

1 other alternate who indicated that he could
2 not be fair in sitting on a case involving
3 the IRS because of the nature of his personal
4 feelings about it, and his feelings about tax
5 fraud cases, et cetera. All of that just
6 signals to me that Alternate #1 is a disaster
7 sitting. If he is into a time press getting
8 into some school that is going to further his
9 career with the United States Government, I
10 can't help but question his ability to at that
11 point impartially judge and determine with
12 that kind of deadline on him. I am enormously
13 concerned about Number One, I would rather
14 go with eleven.

15 THE COURT: Mr. Jay?

16 MR. JAY: Your Honor, we are entitled to go with twelve,
17 that was my point initially.

18 THE COURT: All right, let's not go over it. Do you have
19 anything from that point?

20 MR. JAY: No, sir.

21 THE COURT: All right. Mr. NeMoyer, you have already
22 expressed your view. Mr. Naples, while Mr.
23 Boreanaz is consulting?

24 MR. NAPLES: Your Honor, as we do, the only choice to go
25 with twelve, is to use the alternate that is

1 left, I would much prefer to go with eleven.

2 THE COURT: Mr. Boreanaz?

3 MR. BOREANAZ: Judge, I can't add much, except to say that
4 after consultation with my client, I would
5 oppose the excusal of either juror.

6 THE COURT: Mr. Endler?

7 MR. ENDLER: Your Honor, as far as going with a jury of
8 eleven or anything less than twelve, I am not
9 authorized to make any representation as to
10 that to you. I am wondering, your Honor, if
11 there is any alternative. Mr. Boreanaz has a
12 potential problem. I wonder if we might not
13 consider somehow not going Tuesday morning,
14 and Mr. Gardner would be able to fulfill his
15 obligation. If we were a little more flexible
16 in the trial demands we were making maybe we
17 could go with the original twelve. I don't
18 know what Mr. Gardner's situation is.

19 THE COURT: The only availability I would think would be
20 to not do anything on Tuesday morning and to
21 get into the afternoon, which means we would
22 have to be really summing up and charging on
23 that day, which would certainly carry them
24 into six thirty or seven o'clock by the time
25 they had received the Court's instructions.

1 They could, of course, have what necessarily
2 would be only preliminary deliberations on
3 that evening and come back on Wednesday morning
4 and do what they can during the day on
5 Wednesday. Of course, pieced in with that
6 might be doing what I indicated I did not want
7 to do, and what I think the Government would
8 oppose, and that would be splitting up the
9 summations and having the Government get into
10 its summation today, and having a hiatus
11 between the Government's summation and the
12 defense counsel's summations and whatever
13 rebuttal the Government has, and the charge,
14 which would get it into the jury a lot faster
15 on Tuesday. Do you have a position on that,
16 Mr. Endler?

17 MR. ENDLER:

18 Frankly, your Honor, my obvious objection
19 would be splitting it up. My other objection
20 would be, frankly, I am not prepared at the
21 present time to close, I am not prepared to
22 give my closing. I am wondering, your Honor,
23 if at this time -- I know the Court has other
24 pressing demands next week of its own, which
25 of necessity might curtail the jury selections
to a point where they have not fulfilled them.

1 Whether we have an alternative -- I know that
2 I at least don't want to do it -- there is
3 an alternative in adjourning for a week and
4 maybe alleviating all problems that way, and
5 not holding anyone late, and having no problem
6 as far as any possible curtailment of delibera-
7 tions, and having the closings, charge and
8 deliberations the week after. It is just
9 another alternative that possibly could be
10 used to preserve our twelve.

11 THE COURT: Are you still on, as far as the current
12 situation, Mr. Boreanaz? You are still on in
13 Rochester, Mr. Boreanaz, you personally?

14 MR. BOREANAZ: I have made arrangements to have someone else.
15 I can change those back again. I have made
16 arrangements.

17 THE COURT: You probably would like to be there on that
18 motion?

19 MR. BOREANAZ: I would. I have made arrangements to have
20 someone else appear for me.

21 MR. DOYLE: As an alternative to Alternate #1, I accept
22 any suggestion, even of the prosecutor, up
23 to and including the last, but certainly the
24 week, no problem with that.

25 MR. NE MOYER: I have no objection to what Mr. Endler proposes.

1 THE COURT: All right, get the jury up, I will stew on it.

2
3 (Thereupon the jury entered the courtroom at
4 1:30 P.M.)
5

6 W I L L I A M L. H O L M E S, called as a witness on
7 behalf of the Government, and having been previously duly
8 sworn, resumed and testified further as follows:
9

10 CROSS EXAMINATION BY MR. DOYLE (Cont'd.):

11 Q. I just want to make sure I have given you everything back.
12 That is the material basically -- it might be in a different
13 order -- that you turned over to us before the lunch
14 break?

15 A. Yes, sir, it appears to be all here.

16 Q. Okay. Mr. Holmes, aside from those notes and the trans-
17 cripts, et cetera, and the tapes you have told us about
18 that you listened to, is there anything else that you used
19 to arrive at some of the opinions that you have given
20 here over the last day or so?

21 A. No, sir.

22 Q. So that we get things in proper perspective, I think you
23 have certainly told us, sir, and made it clear that you
24 played no part in this investigation, isn't that right?

25 A. That is correct.

1 keep things out and cross examining and going
2 into details, which are necessary to the case,
3 and each lawyer is doing his best possible job that
4 he can for his respective client. As a result,
5 we have come to this point where a week later we
6 have ended the Government's case. I have been
7 assured by attorneys for the defendants that
8 while most of them have some evidence, I think
9 maybe each has some evidence at this point,
10 they are not bound by what is said, of course,
11 but each at this point gives me some indication
12 that there will be a brief amount of evidence
13 put in on behalf of each, the totality of
14 which should not be more than a half day, but
15 then again you never know. Now, I have not
16 polled the jury to find out what the individual
17 jurors availability and situations are, except
18 the attorneys know this, of course, I have
19 become aware of certain problems that Mr.
20 Gardner has, Juror #1, on the morning of
21 Tuesday the 7th, and have become aware of
22 certain problems that Alternate #1, Mr. Fox,
23 has on that day and the following day, but
24 these do not, he tells me, become insurmountable
25 until he reaches the fourth day of next week,

1 namely, the 9th. There is a possibility perhaps
2 of having a week's adjournment in this case,
3 but I decided that that is not a healthy
4 situation in a case of this complexity and
5 magnitude. It is going to be difficult even
6 with the capable summations of attorneys to
7 get all of this pulled together in your mind
8 so that you, pursuant to my instructions, can
9 properly deliberate. If we let a week go by,
10 a week plus two weekends, it would have to off
11 until the 14th, and that would be impossible,
12 in my mind. So I have decided that while we
13 must close off now, that we will do so only
14 until nine o'clock on Tuesday morning, the
15 7th. Come in at that time. Mr. Gardner, if
16 your situation changes, fine, I will be de-
17 lighted to see you here. If you find that
18 you are in exactly the same situation that you
19 have elaborated to me, and it is unchanged,
20 then I will recognize that you cannot be here.
21 Mr. Fox, in spite of what you told me, you
22 will be here that morning, and if Mr. Gardner
23 is not here, I am going to have to put you
24 in his place in the box. I will expect each
25 of the other jurors here at that time, at nine,

1 and it should be that we would complete the
2 evidence on that morning, and then in the
3 afternoon proceed to the summations of counsel
4 and to my instructions, which unfortunately
5 all of this I know is going to take us to
6 probably somewhere in the area of five thirty
7 to six thirty at night on Tuesday, and at
8 that time the case could be handed to you and,
9 subject to your own decision on it, you would
10 then be holding as a group, with someone
11 selected to speak for you, subject to your
12 own decision, and it would be my suggestion
13 that you with or without going to dinner that
14 evening get into some preliminary deliberations
15 on the case. That is my own thinking, but,
16 again, you are the ones that are going to
17 decide both the case and your determination.
18 My only expectancy is that this case cannot be
19 fully determined and resolved by you in one
20 evening's sitting starting that late, so that
21 at some appropriate time, again subject to
22 what you tell me, we would disband for the
23 evening and come back on the next morning, and
24 Wednesday, this would be the 8th, when you
25 would continue your deliberations and hopefully

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1 THE COURT: All right.

2 MR. NE MOYER: Thank you.

3 THE COURT: Bring up the jury.

4 MR. BOREANAZ: After resting, could we deem it as though the
5 motions were all renewed so as to save time,
6 and I assume the rulings would be the same?

7 THE COURT: Yes, they would.

8

9 (Thereupon the jury entered the courtroom at
10 11:35 A.M. Juror #1 absent.)

11

12 THE COURT: All right. Mr. Gardner is not here, he was
13 Juror #1. Mr. Fox, you were Alternate #1,
14 you are now seated as Juror #1. We have
15 been occupied with various matters this
16 morning, and one of the things concerned the
17 receipt of certain exhibits, certain additional
18 exhibits. I have received Exhibit 223. I
19 have received Exhibits 133 through 138. I
20 have received one item of what was Exhibit
21 141, and this one item comprises one 141 in
22 its totality. I have received 218, and I
23 have received a portion of what originally
24 had been marked as 142. The Government original
25 had offered that, there were three plastic

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WESTERN DISTRICT OF NEW YORK

1 A. The Buffalo office.

2 Q. In that same period, sir, did you have occasion to be
3 involved in the investigation of an illegal gambling
4 business?

5 A. Yes, sir.

6 Q. And sir, are you familiar with the term "case agent"?

7 A. Yes, sir.

8 Q. And at least for the purpose of this investigation were
9 you what is known as the case agent?

10 A. Yes, sir.

11 Q. And were there other personnel in the FBI, other agents,
12 working under your direction in this case?

13 A. That is correct.

14 Q. Sir, during this case, among other cases, did you have
15 occasion to conduct physical surveillance?

16 A. Yes, sir, I did.

17 Q. Can you tell us, sir, if you can recollect when was the
18 first occasion with regard to this case?

19 A. I can't be sure, but I believe October 15, 1975.

20 Q. On October 15th can you tell us what you had occasion to
21 physically surveil, what you observed?

22 A. Yes, sir. I observed Edward Owczarzak meet with Richard
23 Kelsey in the parking lot of the Como Park Hall. The two
24 drove their respective vehicles, Edward Owczarzak in an
25 Oldsmobile convertible, license plate 432-EUD, drove this

1 vehicle over, stopped in the immediate vicinity of Richard
2 Kelsey, who was driving a blue Chevrolet, license 122-DVI.
3 They paused for several moments, and I observed something
4 being passed between the two vehicles. Shortly after that
5 both vehicles left the mall area, proceeding north on
6 Union Road. I continued the surveillance of Edward Owczarzak,
7 who travelled by way of the New York State Thruway, Millers-
8 port Highway, into the vicinity of the Amherst Manor Apart-
9 ments, 1525 Millersport Highway.

10 Q. Sir, prior to seeing Mr. Owczarzak at the Como Mall, had
11 you observed him earlier in that day somewhere else?

12 A. No, sir, not myself personally.

13 Q. And the Mr. Owczarzak that you observed on October 15th,
14 is he in the courtroom today, sir?

15 A. Yes, sir, he is.

16 Q. If he is, could you point him out?

17 A. The gentleman that just stood up.

18 MR. ENDLER: Let the record reflect that the witness has
19 identified the defendant, Mr. Owczarzak.

20 BY MR. ENDLER:

21 Q. The Mr. Kelsey that you observed on October 15th, is he
22 in the courtroom today, sir?

23 A. Yes sir.

24 Q. And if he is, could you point him out?

25 A. The gentleman that just stood up.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 10/17/75

Physical Surveillance of EDWARD A. OWCZARZAK
 76 Williamstowne Court North
 Cheektowaga, New York
 October 15, 1975

4:30 PM

Surveillance instituted in the vicinity of captioned address. A black convertible top over gold Oldsmobile Cutlass bearing New York State License (NYSL) 432 EUD is observed parked in the vicinity of captioned address.

5:45 PM

A white male believed to be EDWARD A. OWCZARZAK exits 76 Williamstowne Court North, enters above-described vehicle and departs the area.

5:48 PM

Above vehicle is observed to enter the Como Mall parking lot, Como Park Boulevard and Union Road. This vehicle stops in the vicinity of the Mens & Kelley Department Store. The driver is observed to roll down the window. RICHARD KELSEY, driving a blue Chevrolet Chevelle bearing NYSL 122 EVI, is observed to drive alongside of the above Oldsmobile Cutlass. KELSEY rolls down the driver's side window and stops his vehicle so that both drivers are facing each other. The above two individuals are observed to engage in conversation. KELSEY is seen extending his hand from his vehicle and taking something from the subject.

5:50 PM

KELSEY, in the above blue Chevelle, departs the Como Mall, proceeding north on Union Road. The subject then exits the mall area, proceeding north on Union Road.

6:07 PM

The subject is observed to proceed north on Millersport Highway through the intersection of Millersport and Maple Road. He turns east into the entryway of the Amherst Manor Apartments, 1525 Millersport Highway, Amherst, New York. The subject proceeds in his vehicle to the extreme

Interviewed on 10/15/75 at Buffalo, New York File # Buffalo 132-791

SAs JOHN C. POERSZEL and
 JOSEPH M. SCIACCA/JCP:jan

Date dictated 10/17/75

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32
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5:07 PM eastern end of the complex and then returns to
(Cont.) Millersport Highway and exits the area.

JCP 5:09 PM After proceeding north on Millersport Highway,
subject turns east onto a driveway into the
Audobon Amherst Recreation Center, 1615 Millersport
Highway, Amherst, New York. Subject proceeds
around a circular driveway, then exits the driveway
onto Millersport Highway.

JCP 6:10 PM Subject then returns to the Amherst Manor Apartment
complex and parks his vehicle behind the first
apartment building to the north of the entrance way.

JCP 6:30 PM Surveillance discontinued. No further activity noted.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

RICHARD KELSEY and
EDWARD A. OWCZARZAK,

Defendants-Appellants

AFFIDAVIT OF
SERVICE

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

CONSTANCE L. OHLHUES, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1240 Delaware Avenue, Buffalo, New York. That on the 13th day of April, 1977, deponent served the within brief on appeal upon Howard Weintraub, Esq., attorney for the United States of America in this action, at P. O. Box 899, Ben Franklin Station, Washington, D.C., the address designated by said attorney for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States post office department within the State of New York.

Constance L. Ohlhuess

Sworn to before me this
13th day of April, 1977.

Linda D. Fiorella

LINDA D. FIORELLA
COMMISSIONER OF DEEDS

In and For the City of Buffalo, New York
My Commission Expires Dec. 31, 1978

DOYLE & DENMAN
ATTORNEYS AT LAW

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is
the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent
further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

ss.:

INDIVIDUAL VERIFICATION

deponent is the
read the foregoing
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and
belief, and that as to those matters deponent believes it to be true.
Sworn to before me, this day of 19

, being duly sworn, deposes and says that
in the within action; that deponent has
and knows the contents thereof; that

STATE OF NEW YORK, COUNTY OF

ss.:

CORPORATE VERIFICATION

of
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

, being duly sworn, deposes and says that deponent is the
the corporation

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at

the address designated by said attorney(s)
for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States post office department within the State of New York.
Sworn to before me, this day of 19

NOTICE OF ENTRY

Sir :- Please take notice that the within is a (*certified*)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,

DOYLE & DENMAN

ATTORNEYS FOR

OFFICE & POST OFFICE ADDRESS
10 ELLICOTT SQUARE COURT
ELLICOTT SQUARE BUILDING
BUFFALO, NEW YORK 14203
(716) 856-3486

To

Attorney for

NOTICE OF SETTLEMENT

Sir :- Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

DOYLE & DENMAN

ATTORNEYS FOR

OFFICE & POST OFFICE ADDRESS
10 ELLICOTT SQUARE COURT
ELLICOTT SQUARE BUILDING
BUFFALO, NEW YORK 14203
(716) 856-3486

To

Attorney for

INDEX NO.

YEAR 19

STATE OF NEW YORK
U.S. COURT OF APPEALS COURT

County of ERIE

THE UNITED STATES OF
AMERICA,

Appellee

VS.

RICHARD KELSEY and
EDWARD A. OWCZARZAK,

Appellants

ORIGINAL

AFFIDAVIT OF SERVICE

DOYLE & DENMAN

ATTORNEYS FOR Appellants

OFFICE & POST OFFICE ADDRESS
10 ELLICOTT SQUARE COURT
ELLICOTT SQUARE BUILDING
BUFFALO, NEW YORK 14203
(716) 856-3486

To

Attorney for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney for

SAMSON PAPER CO., CONSHOHOCKEN, PA.